Supreme Court, U.S.
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No.

In the Supreme Court of the United States

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

YI QUAN CHEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals exceeded the proper scope of judicial review when it overturned a determination by the Board of Immigration Appeals (BIA) that respondent did not testify credibly when seeking asylum and withholding of removal from the United States.

2. Whether the court of appeals erred when, after reversing the BIA's determination that respondent failed to provide credible testimony, the court itself decided the remaining legal and factual issues relevant to respondent's eligibility for asylum and withholding of removal from the United States, rather than remanding the case to the BIA for it to address those issues in the first instance.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Immigration and Naturalization Service, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-15a) is reported at 266 F.3d 1094. The opinion of the Board of Immigration Appeals (App., *infra*, 16a-48a) and the oral decision of the immigration judge (App., *infra*, 49a-58a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 11, 2001. A petition for rehearing was

denied on March 11, 2002 (App., *infra*, 59a). On June 3, 2002, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including July 9, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent provisions of the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, and pertinent provisions of Title 8 of the Code of Federal Regulations, are reproduced in Appendix E to this petition (App., *infra*, 60a-68a).

STATEMENT

1. a. The Immigration and Nationality Act (INA) defines the term "refugee" to mean an alien who is unwilling or unable to return to his home country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A). An alien who is a refugee is eligible to be considered for asylum in the United States, provided that the alien is not disqualified from consideration because of past conduct such as participating in persecution or committing a particularly serious crime. 8 U.S.C. 1158(b)(1) and (2). The Attorney General is vested with discretion whether to grant asylum to an alien who satisfies the statutory definition of a refugee. 8 U.S.C. 1158(b)(1) and (2)(D), 1252(a)(4)(D).

Congress has authorized the Attorney General to establish "requirements and procedures" governing asylum applications. 8 U.S.C. 1158(b)(1); see also 8 U.S.C. 1158(b)(2)(C), (d)(1) and (d)(5)(B). Regulations issued pursuant to the Attorney General's authority

place on the asylum applicant the burden of proving that he is a refugee. 8 C.F.R. 208.13(a). The regulations provide that "[t]he testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration." *Ibid.*; see *In re Dass*, 20 I. & N. Dec. 120, 124 (BIA 1989) ("[A]n alien's own testimony may in some cases be the only evidence available, and it can suffice where the testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for his alleged fear.").

An asylum applicant who establishes that he suffered past persecution in his home country on account of a statutorily protected characteristic is presumed to have a well-founded fear of future persecution if returned to that country. 8 C.F.R. 208.13(b)(1). But the presumption is overcome if the asylum officer or immigration judge finds by a preponderance of the evidence that there has been a "fundamental change in circumstances" in the home country, 8 C.F.R. 208.13(b)(1)(i)(A), or that the applicant reasonably could avoid persecution by relocating within his home country, 8 C.F.R. 208.13(b)(1)(i)(B). An applicant who has not established persecution in the past nevertheless can qualify as a refugee and be eligible for asylum if he otherwise proves, *inter alia*, that "[t]here is a reasonable possibility of suffering such persecution if [the applicant] were to return to [his home] country." 8 C.F.R. 208.13(b)(2)(i)(B).

An alien who is charged with being removable from the United States may present an asylum claim as a defense to removal.[1] See generally 8 C.F.R. 208.2-208.5.

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[1] In Section 304(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No.

Such a claim, and other issues relevant to whether the alien will be removed from the United States, are decided by an immigration judge (IJ) after a hearing. See 8 C.F.R. 208.13(b) and (c). The asylum decisions of IJs are appealable to the Board of Immigration Appeals (BIA), which has the power to conduct a de novo review of the record, to make its own findings of fact, and to determine independently the sufficiency of the evidence. See, *e.g.*, *Elnager* v. *INS*, 930 F.2d 784, 787 (9th Cir. 1991); see also 8 C.F.R. 3.1. A finding by the BIA that an asylum applicant failed to carry his burden of proof is reviewable, on judicial review of the final order of removal entered against the alien, by the federal court of appeals for the circuit in which the IJ's hearing was held. See 8 U.S.C. 1252(b)(2).[2]

Judicial review of the BIA's decisions, including those addressing asylum issues, is limited by statute. See 8 U.S.C. 1252(b)(4). Most important here, the court of appeals must "decide the petition [for review] only on the administrative record on which the order of removal is based," 8 U.S.C. 1252(b)(4)(A), and "the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary," 8 U.S.C. 1252(b)(4)(B).

b. The INA also provides for a related form of relief from removal, known as "withholding of removal." If

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104-208, Div. C, 110 Stat. 3009-587 to 3009-593, Congress established a new form of proceeding known as "removal," which applies to aliens who have entered the United States but are deportable, as well as to aliens who are excludable at the border. See 8 U.S.C. 1229, 1229a.

[2] Asylum claims filed by an alien who has not yet been placed in removal proceedings are decided by asylum officers. See 8 C.F.R. 208.2, 208.9-208.12. The decisions of asylum officers are not appealable to the BIA.

the Attorney General determines that the "alien's life or freedom would be threatened" in the country to which the alien would be removed "because of the alien's race, religion, nationality, membership in a particular social group, or political opinion," the alien may be eligible for this form of relief. 8 U.S.C. 1231(b)(3)(A). Unlike asylum, withholding of removal is mandatory rather than discretionary in nature. To be entitled to relief from removal, however, the alien must not fall within one of the specified categories of criminal and other dangerous aliens. See 8 U.S.C. 1231(b)(3)(B) (excepted aliens). The alien must demonstrate a "clear probability of persecution" in order to receive withholding of removal. *INS* v. *Stevic*, 467 U.S. 407, 430 (1984); see *INS* v. *Cardoza-Fonseca*, 480 U.S. 421 (1987) (discussing relationship between asylum and withholding of removal); *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 419-420 (1999) (same). As with an applicant for asylum, the applicant for withholding of removal bears the burden of proving his eligibility for relief, and the applicant's testimony may alone suffice to establish eligibility if it is credible. See 8 C.F.R. 208.16(b). In addition, as in asylum cases, a finding that the alien has suffered past persecution in the country of removal on the basis of a protected characteristic gives rise to a rebuttable presumption that the alien's life or freedom would be threatened in the future on the same basis. See 8 C.F.R. 208.16(b)(1). BIA decisions on applications for withholding of removal are subject to judicial review under the same rules as BIA decisions on asylum applications. See 8 U.S.C. 1252.

2. Respondent is a native and citizen of the People's Republic of China (China). App., *infra*, 2a, 17a. In April 1995, respondent attempted to enter the United States using a fraudulent passport. *Id.* at 2a, 50a.

Respondent was apprehended and placed in deportation proceedings. He then applied for asylum on the ground that, if returned to China, he would face persecution on account of his and his father's pro-democracy activities. *Id.* at 2a; see A.R. 171-180 (1995 asylum application). Respondent stated in his 1995 asylum application that he was not married. App., *infra*, 9a-10a, 20a-21a. Respondent also submitted two counterfeit birth certificates that falsely indicated that he was born in 1979 (and therefore was 16 years old) rather than in 1975 (which made his actual age 20 years old). See *id.* at 7a, 20a. Respondent's asylum application was denied, and he was returned to China in 1996. *Id.* at 2a, 51a.

3. In 1998, respondent was apprehended while attempting to reenter the United States illegally. Respondent again applied for asylum, as well as for withholding of removal and other relief not relevant here. This time respondent claimed that, if he was returned to China, he would be persecuted because he had resisted Chinese family-planning laws. See App., *infra*, 3a. Respondent made no mention of pro-democracy activities in his 1998 application. See *id.* at 55a.

In June 1999, an IJ held a hearing on respondent's new application for asylum and withholding of removal. Respondent testified that in October 1994— before he attempted to enter the United States the first time—he entered into an unofficial marriage in China. Respondent stated that he and his wife did not obtain official permission to marry because they had not reached the minimum marriage age established by the Chinese government. App., *infra*, 2a, 50a, 52a.

Respondent further testified that in February 1995, he and his wife learned that his wife was pregnant. Chinese family-planning officials allegedly attempted to

arrest the couple and to perform an abortion, but, according to respondent, he and his wife escaped. App., *infra*, 2a, 17a, 50a-51a. Respondent said that he then departed for the United States, leaving his wife in China. *Id.* at 51a.

Respondent stated at the hearing that, after his deportation from the United States, he arrived in Shanghai in 1996 and was beaten by Chinese officials and then detained at a hospital until he escaped after approximately one month. App., *infra*, 3a, 51a. Respondent testified that after escaping, he initially stayed with relatives and then, in an effort to evade family-planning officials, moved to another town, where he lived for two years until he tried to reenter the United States in 1998 (again leaving his wife, and now his child, in China). *Id.* at 3a, 51a-52a. Respondent said that he feared that if he was repatriated to China, he would be sent to a labor prison on account of his unsanctioned marriage, his two unauthorized departures from China, and his escape from the Shanghai detention hospital. *Id.* at 52a; see A.R. 118, 140.

4. The IJ denied respondent's application for asylum and withholding of removal and ordered him removed to China. App., *infra*, 57a, 58a. The IJ first determined that respondent had not provided credible testimony in support of his claims for asylum and withholding of removal. The IJ cited: (1) discrepancies between respondent's second written application for asylum, his earlier asylum application in 1995, and his oral testimony at the 1999 hearing; (2) the fact that "respondent changed his story" during the course of his 1999 testimony, *id.* at 55a; (3) respondent's failure to make any reference during the 1995 asylum proceeding to facts upon which respondent relied in 1999; and (4) respondent's submission during the 1995 proceeding of

the two counterfeit birth certificates. See *id.* at 54a-56a. The IJ noted, for example, that although respondent had claimed in his 1995 application that he had been persecuted on the basis of his political activities in China, he stated in his 1998 application (A.R. 341) that he had no affiliation with any political group or organization. App., *infra*, 55a. The IJ also noted that in a sworn statement made when respondent entered the United States in 1998 (A.R. 243-244), respondent made no mention of family-planning issues and stated that his fear of returning to China was that he would have to pay a fine for leaving China. App., *infra*, 55a. The IJ concluded that "[i]t appears * * * that the respondent has told so many different stories that it is difficult for him to keep them straight." *Id.* at 55a-56a.

The IJ then held that even if respondent's testimony were truthful, respondent's application for asylum and withholding of removal nevertheless would fail. App., *infra*, 56a-57a. The IJ concluded that respondent's testimony, even if believed, would not be enough to establish that Chinese family-planning officials wanted to imprison or harm responent because of any past resistence to family-planning measures. *Id.* at 56a. Furthermore, the IJ noted, a State Department report in the administrative record indicated that Chinese authorities do not require abortions for pregnant women who are in an unauthorized marriage. *Ibid.* The IJ found no direct evidence that, after respondent escaped from the Shanghai detention hospital in 1996, Chinese police pursued him because of any defiance of family-planning laws or political activities. *Id.* at 57a. Finally, the IJ held that respondent's asylum application was based on a fabricated story and frivolous, *ibid.*, a finding that would have rendered respondent permanently ineligible for the benefits

available to aliens under the INA, see 8 U.S.C. 1158(d)(6).

5. In April 2000, the BIA affirmed the IJ's finding that respondent did not provide credible testimony and dismissed respondent's appeal. App., *infra*, 16a-24a. The BIA specifically noted respondent's failure to explain his submission of counterfeit birth certificates during the 1995 proceedings, respondent's statement in 1995 that he was unmarried, respondent's failure to mention family-planning issues in connection with his 1995 asylum application, and respondent's inconsistent and vague testimony in 1999 about such matters as his wife's residence and the alleged efforts by Chinese officials to force her to have an abortion. *Id.* at 20a-21a. The BIA, however, reversed the IJ's determination that respondent's asylum application was frivolous for purposes of denying future benefits under the INA. The BIA explained that it did not find "sufficient evidence of deliberate fabrication of material elements [of the application] as required under applicable regulations." App., *infra*, 23a; see 8 C.F.R. 208.20.

One panel member dissented. She would have found that the inconsistencies in respondent's hearing testimony and in his two asylum applications were either immaterial or explicable, and would have granted respondent relief from removal. App., *infra*, 25a-48a.

6. The United States Court of Appeals for the Ninth Circuit reversed the BIA's decision, determined that respondent is eligible for a discretionary grant of asylum, and ordered the Immigration and Naturalization Service (INS) to grant respondent withholding of removal. App., *infra*, 1a-24a. The court first held that the BIA had not identified sufficient grounds for its adverse credibility finding. *Id.* at 6a. Addressing the BIA's reliance on respondent's submission of counter-

feit birth certificates in 1995, the court found that respondent adequately explained his use of the false evidence by saying that he was unaware that the certificates misstated his year of birth. *Id.* at 7a. The court posited that there were "'any number of reasons to account for' the discrepancies" in the birth certificates. *Ibid.* (quoting *Shah* v. *INS*, 220 F.3d 1062, 1068 (9th Cir. 2000)). The court further held that the BIA should not have considered the false birth certificates because their misstatements about respondent's age affected only whether respondent would be treated as a juvenile or an adult in 1995, and did not strengthen respondent's underlying claim for asylum. *Id.* at 8a.

The court of appeals next held that respondent's completely different claims of persecution in the 1995 and 1998 applications did not establish a lack of credibility. The court reasoned that "flight from political oppression * * * provided a stronger legal basis for asylum" when respondent filed his first application, but that "at the time of his second application * * *, resistance to China's population control policies was a viable basis for an asylum claim." App., *infra*, 9a. Thus, the court held, respondent's claim of persecution based upon his opposition to family planning, rather than upon the asserted pro-democracy activities that had been the subject of his first application, was not a basis for finding respondent untrustworthy in the second asylum proceedings. *Ibid.*

The court of appeals likewise believed that respondent had provided a "more than reasonable" explanation for claiming in 1995 that he was unmarried—*i.e.*, that he was "confus[ed] about how to characterize his marriage in light of the Chinese government's view that his marriage was not official." App., *infra*, 10a. Thus, the court held that this discrepancy furnished

"insufficient grounds" for the BIA's adverse credibility determination. *Ibid.*

The court also "disagree[d]" with the BIA's identification of several other inconsistencies and gaps in respondent's testimony. App., *infra*, 10a. Respondent's testimony, in the court's view, was "concrete and consistent," and "[t]he BIA failed to provide the requisite specific, cogent reason for discrediting [the testimony]." *Ibid.*

Having found inadequate the specific reasons given by the BIA for finding respondent's testimony not credible, the court of appeals—rather than remanding to the BIA for further assessment of respondent's credibility—ruled that respondent was in fact credible and "his statements should be accepted as true." App., *infra*, 10a. In addition, although the court acknowledged that the BIA "reasonabl[y]" did not consider whether respondent's testimony, if taken as true, established eligibility for relief, the court did not remand for administrative consideration of that question either. *Id.* at 11a. Rather, the court concluded that it was "clear" from the administrative record that the BIA could not lawfully deny respondent's application, and therefore the court rejected further agency consideration on the ground that it would "risk[] 'a series of unnecessary and inefficient remands, to the detriment of the party seeking relief.'" *Ibid.* (quoting *Navas* v. *INS*, 217 F.3d 646, 662 (9th Cir. 2000)).

Thus, after crediting respondent's testimony, the court proceeded to make findings about various substantive elements of respondent's asylum claim: that respondent's beating and detention in Shanghai in 1996 constituted persecution, App., *infra*, 12a; that respondent was persecuted on account of his political opinion, which the court characterized as "based on freedom to

create one's own family," *id.* at 13a; that the Chinese government was responsible for the persecution, *ibid.*; and that conditions in China had not changed significantly since respondent's persecution, *id.* at 12a n.4, 14a. The court therefore ruled that respondent has a well-founded fear of persecution if returned to China, which renders him eligible to be considered by the Attorney General for asylum. *Id.* at 14a. The court then remanded respondent's asylum claim to the BIA to determine whether he should be granted asylum as a matter of discretion. *Id.* at 15a.

For the same reasons, the court found that respondent had established his entitlement to withholding of removal. App., *infra*, 14a-15a. As to that claim, the court stated that "[i]f [respondent] were to return to China, there is little doubt—and certainly more than a fifty percent chance—that his persecutors would continue to inflict emotional and physical punishment for his contravention of the family planning laws." *Id.* at 15a. "In view of the confinement and persecution [respondent] suffered and his genuine fear that he will be persecuted if returned to China," the court continued, "we deem it only just and equitable that [respondent] be granted withholding of removal." *Ibid.* The court therefore awarded respondent withholding of removal. *Ibid.*

7. On March 11, 2002, the court of appeals denied the government's timely petitions for rehearing and rehearing en banc. App., *infra*, 59a.

REASONS FOR GRANTING THE PETITION

This case is part of a series of recent asylum and withholding-of-removal cases in which the Ninth Circuit has disregarded the fact-finding role assigned by statute, regulation, and this Court's decisions to

immigration judges and the Board of Immigration Appeals, and has defied the most basic rules of judicial review. In one of these recent cases, eight Ninth Circuit judges explained that their court "overthrows * * * perfectly reasonable BIA decision[s]" in asylum and withholding-of-removal cases "by invoking novel rules divorced from administrative law, Supreme Court precedent and common sense," and thus has "whittled away the authority and discretion of immigration judges and the BIA." *Abovian* v. *INS*, 257 F.3d 971 (9th Cir. 2001) (Kozinski, J., dissenting from denial of rehearing en banc). Certiorari is warranted to correct the court of appeals' systematic departure from the requirements of the Immigration and Nationality Act and this Court's precedents in this widely litigated area of immigration law.[3]

1. The court of appeals' initial error, which warrants review and reversal by this Court, was its failure to defer to the BIA's reasonable findings of fact, and its decision, instead, to resolve for itself the question of whether respondent provided credible testimony.

a. In *INS* v. *Elias-Zacarias*, 502 U.S. 478 (1992), this Court rejected the notion that a reviewing court may overturn a determination of the BIA in an asylum case whenever the court believes that the evidence supports a conclusion different from that of the BIA.[4]

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[3] In *Abovian*, because of unique procedural issues arising from the manner in which the Ninth Circuit considered whether to rehear the case en banc, there was a question whether this Court would have had certiorari jurisdiction under 28 U.S.C. 1254(1) and Rule 13.3 of the Rules of this Court to review the Ninth Circuit's decision. In those circumstances, the Solicitor General decided not to file a certiorari petition in *Abovian* itself.

[4] By regulation, asylum applications are deemed to include an application for the alternative relief of withholding of removal. See

This Court explained that "[t]o reverse the BIA finding we must find that the evidence not only *supports* that conclusion, but *compels* it." *Id.* at 481 n.1. Thus, an asylum applicant who "seeks to obtain judicial reversal of the BIA's determination * * * must show that the evidence he presented was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution." *Id.* at 483-484.[5]

In 1996, as part of the Illegal Immigration Reform and Immigrant Responsibility Act, Congress codified the principles that this Court articulated in *Elias-Zacarias*. Congress directed that a court of appeals reviewing an order of removal must confine its review to the administrative record before the agency and must accept the BIA's findings of fact as "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. 1252(a)(4)(A) and (B).

b. Despite those clear rules, the Ninth Circuit has developed a body of circuit law that relieves the applicant of his burden of proof in asylum cases and allows the court to substitute its own views about contested record evidence for reasonable determinations of the BIA. See *Abovian*, 257 F.3d at 979 (Kozinski, J., dissenting from denial of rehearing en banc) (noting that Ninth Circuit "rules" of judicial review "take the

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8 C.F.R. 208.3(b). We therefore use the term "asylum case" to include adjudication of an application for withholding of removal.

[5] The *Elias-Zacarias* test puts an alien seeking reversal of an adverse BIA finding in essentially the same position as a party who seeks judgment as a matter of law under Rule 50 of the Federal Rules of Civil Procedure. See *NLRB* v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939) (cited in *Elias-Zacarias*, 502 U.S. at 481).

asylum decision from the BIA and put it in the hands of our court").

In *Shah* v. *INS*, 220 F.3d 1062 (9th Cir. 2000), for example, the court of appeals held that the BIA may not base an adverse credibility determination upon an inconsistency between the applicant's testimony and his documentary evidence if "the discrepancy is *capable* of being attributed to a typographical or clerical error." *Id.* at 1068 (emphasis added). That rule effectively relieves the alien of his burden of proving the reliability of his evidence and puts the burden on the INS, when it opposes an asylum application, to prove that a facial contradiction in the applicant's own evidence does not have an innocent explanation. 8 U.S.C. 1252(a)(4)(B). The Ninth Circuit thus has turned the rule of *Elias-Zacarias* on its head by accepting the alien's explanation for an inconsistency unless the record compels the conclusion that the BIA was correct in rejecting the alien's explanation. Cf. *Cardenas* v. *INS*, No. 01-70557, 2002 WL 1286076, at *6 (9th Cir. June 12, 2002) (Graber, J., dissenting) ("[T]he majority resolves every ambiguity in favor of [the asylum applicant], whereas [the correct] standard of review requires us to resolve every ambiguity in favor of the decision-maker below.").[6]

In *Bandari* v. *INS*, 227 F.3d 1160 (9th Cir. 2000), the court of appeals held that what it termed "minor" inconsistencies in an asylum applicant's testimony must be ignored if they do not relate to facts that bear directly upon satisfaction of the statutory criteria for

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[6] As the Ninth Circuit has itself suggested, enforcing the alien's burden of proof in asylum cases is particularly important because "[t]he events [surrounding claims of persecution] are distant and an investigation [by the INS] to determine truth is impracticable." *Mejia-Paiz* v. *INS*, 111 F.3d 720, 722 (1997).

asylum. *Id.* at 1166; see also App., *infra*, 4a ("Adverse credibility determinations based on minor discrepancies, inconsistencies, or omissions that do not go to the heart of an applicant's asylum claim cannot constitute substantial evidence."). Thus, the court held in *Bandari* that the IJ could not take into account, when determining whether the alien's allegations of police beatings were credible, the alien's inconsistent testimony about when and where he was beaten. 227 F.3d at 1165-1166. The court also held in *Bandari* that it was error for the IJ to conclude that, if a particular claim made by the alien were true, then the alien would have included it in his written application for asylum. The court dismissed the IJ's judgment on that point as a "subjective view," and stated that such judgments "ha[ve] no place in an adverse credibility determination." *Id.* at 1167.

In *Abovian* v. *INS*, 219 F.3d 972 (2000), reh'g denied, 257 F.3d 971 (9th Cir. 2001), the court similarly defied common sense when it held that the BIA may not consider an asylum applicant's unexplained failure to support his testimony with documentary proof. *Id.* at 978. And the court further held in *Abovian* that the BIA could not draw inferences from the "'disjointed[ness]' and 'incoherence'" of the applicant's testimony in that case, speculating that those features of the testimony "were *possibly* the result of mistranslation or miscommunication." *Id.* at 979 (quoting *Akinmade* v. *INS*, 196 F.3d 951, 956 (9th Cir. 1999)) (emphasis added and internal quotation marks omitted).

c. The Ninth Circuit's decision in this case is part of the same pattern of overreaching. The decision below recites the rule that the BIA's findings of fact must be upheld unless "any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C.

1252(b)(4)(B); see App., *infra*, 4a. But it in fact exemplifies the Ninth Circuit's application of erroneous rules of law that violate the statutory standards for judicial review of asylum decisions, bar the BIA from considering probative evidence, and usurp the BIA's assigned fact-finding function.

For instance, it is widely recognized that "[i]f a witness lies on any point, no matter how irrelevant it may at first appear, * * * the witness's credibility is tenuous at best, and the entire testimony can be discredited." Jeffrey L. Kestler, *Questioning Techniques and Tactics* § 1:22 (3d ed. 1999); see *In re O-D-*, 21 I. & N. Dec. 1079, 1083 (BIA 1998) (submission of fraudulent documents "tarnishes the respondent's veracity and diminishes the reliability of his other evidence."). Yet the court of appeals' rules against giving weight to "minor" testimonial inconsistencies and against holding an alien accountable for inconsistencies in his own evidence (see App., *infra*, 7a-8a (discussing Ninth Circuit cases)) led the court to the nonsensical conclusion (*id.* at 8a) that respondent's submission of counterfeit documents in the 1995 asylum proceeding "reveal[s] nothing" about respondent's credibility.

So too, it was plainly wrong for the Ninth Circuit to conclude (App., *infra*, 8a-10a) that no "reasonable adjudicator" (8 U.S.C. 1252(b)(4)(B)) could find that respondent's failure to mention family-planning issues in his 1995 asylum application, and his 1995 statement that he was unmarried, cast doubt upon respondent's testimony in the second asylum proceeding that he was married and his wife was pregnant when he fled China in 1995, and that he fled because he was being pursued by family-planning officials. See *Jencks* v. *United States*, 353 U.S. 657, 667 (1957) ("The omission from [earlier statements] of facts related at the trial, or a contrast in

emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony."); see also *Jenkins* v. *Anderson*, 447 U.S. 231, 239 (1980) ("Common law traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted."). Once again, the decision below shows the error (indeed, the absurdity) of Ninth Circuit precedent—here, the circuit rule that allows an alien to negate inconsistencies in his evidence of persecution by suggesting some innocent explanation for the inconsistencies, even if other, less-innocent explanations are equally or more likely. See *Shah*, 220 F.3d at 1068 (applying rule); *Abovian*, 219 F.3d at 979 (same).

Finally, the court of appeals erred in this case by treating each inconsistency or gap in respondent's evidence as an isolated defect. The court should not have inquired whether each evidentiary concern articulated by the BIA independently constituted sufficient grounds for the BIA's finding that respondent was not credible. See App., *infra*, 8a (counterfeit birth certificates "cannot form the basis for an adverse credibility finding"); *id.* at 10a (1995 claim of being unmarried is "insufficient grounds * * * upon which to find [respondent] not to be credible."); *ibid.* (BIA's determination that respondent's testimony was implausible "does not suffice to find him not to be credible."). The pertinent question, instead, is whether the inconsistencies and gaps upon which the BIA relied *cumulatively* rendered it reasonable for the BIA to disbelieve respondent's testimony. And on that question, the BIA's deference to the IJ who observed the witness's live testimony was particularly appropriate. See *id.* at

19a (noting that IJ "is in the best position to observe a witness' demeanor"); see *id.* at 19a-20a n.1.

This Court recently addressed a similar error by the Ninth Circuit in the Fourth Amendment context. See *United States* v. *Arvizu*, 122 S. Ct. 744 (2002). In *Arvizu*, the Ninth Circuit "appeared to believe that each observation by [a law enforcement officer] that was by itself readily susceptible to an innocent explanation was entitled to 'no weight'" when determining whether the totality of the circumstances surrounding a police encounter gave rise to a reasonable suspicion of illegal activity. *Id.* at 751. This court rejected the Ninth Circuit's "divide-and-conquer analysis," clarifying that facts that are capable of an innocent explanation when viewed in isolation nevertheless may be probative when viewed together. *Ibid.* The same principle applies in this case. Regardless of whether it would have been unreasonable for the BIA to reject respondent's testimony based upon just one of the inconsistencies that the BIA identified, it was reasonable for the BIA to reject the testimony based upon the collective significance of all the inconsistencies. See App., *infra*, 21a ("Based on the counterfeit documents of record, the respondent's inconsistent testimony, and the lack of explanation by the respondent, we find sufficient basis to affirm the Immigration Judge's adverse credibility finding."). And it certainly cannot be said that "any reasonable adjudicator would be compelled" (8 U.S.C. 1252(b)(4)(B)) to view in isolation each record indication that respondent did not testify credibly.[7]

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[7] Contrary to the court of appeals' approach to record materials that *undermine* an asylum application, that court has insisted that the BIA give collective consideration to materials that *support* an

d. The Ninth Circuit's departure from the requirements of 8 U.S.C. 1252(b)(4) and *Elias-Zacarias* puts it in conflict with other courts of appeals that faithfully apply those binding authorities and so enforce the asylum applicant's burden of proof, defer to the BIA's reasonable factual inferences, and recognize that evidentiary defects may carry cumulative significance. See, *e.g.*, *Mansour* v. *INS*, 230 F.3d 902, 906 (7th Cir. 2000) (upholding adverse credibility finding when asylum applicant failed to provide "convincing reasons" for inconsistency of his evidence); *Bojorques-Villanueva* v. *INS*, 194 F.3d 14, 17 (1st Cir. 1999) (BIA's observation that asylum applicant should have remembered the details of his father's kidnaping was "the very stuff of legitimate impeachment"); *Rucu-Roberti* v. *United States Dep't of Justice, INS*, 177 F.3d 669, 670 (8th Cir. 1999) (upholding adverse credibility finding based in part upon BIA's determination that applicant's story was implausible); *Chun* v. *INS*, 40 F.3d 76, 78-79 (5th Cir. 1994) (upholding adverse credibility finding based upon collective significance of inconsistencies).

2. A second, related error by the court of appeals also warrants correction by this Court, for similar reasons. The Ninth Circuit's practice of refusing to remand unresolved issues to the BIA for administrative consideration in the first instance contravenes this Court's repeated instruction outlining the correct relationship between administrative agencies and reviewing courts, and further intrudes upon the Executive Branch's implementation of the INA. Certiorari is warranted on this issue as well.

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asylum application. See *Popova* v. *INS*, 273 F.3d 1251, 1258-1259 (9th Cir. 2001) (quoting *Chouchkov* v. *INS*, 220 F.3d 1077, 1083 (9th Cir. 2000)).

a. When a court reviews an adjudicatory decision by a federal agency that Congress has charged with administering a statute, respect for the agency's primary jurisdiction requires the court to refrain from rendering its own findings of fact or resolving issues the agency did not consider. See *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290, 303-304 (1976); *Port of Portland* v. *United States*, 408 U.S. 811, 842 (1972) ("Our appellate function in administrative cases is limited to considering whether the announced grounds for the agency decision comport with the applicable legal principles."); *SEC* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943). A court of appeals "is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry." *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985). Rather, "[i]f the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Ibid.* "The function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the [agency] for reconsideration." *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952).

These principles carry special weight in asylum cases because of the implications that they hold for foreign affairs, national defense, and defining the national community (see p. 28, *infra*), and also because of the clarity with which Congress has entrusted decisions concerning asylum and withholding of removal to the Attorney General. See, *e.g.*, 8 U.S.C. 1158(b)(1) ("*The Attorney General may grant* asylum to an alien who

has applied for asylum in accordance with the requirements and procedures established by the Attorney General under this section *if the Attorney General determines* that such alien is a refugee.") (emphasis added); 8 U.S.C. 1231(b)(3)(A) ("the Attorney General may not remove an alien to a country *if the Attorney General decides* that the alien's life or freedom would be threatened") (emphasis added).

b. When it overturns a finding made by the Attorney General's delegates at the BIA in an asylum case, the Ninth Circuit often does *not* remand to permit the BIA to decide whether its earlier finding can be better supported, or whether the record justifies a different finding. As in this case, the court frequently makes its own de novo finding that the alien has carried his burden of proof and announces the alien's eligibility for asylum. See, *e.g.*, App., *infra*, 1a, 11a-14a, 15a; *Salaam* v. *INS*, 229 F.3d 1234, 1240 (9th Cir. 2000); *Bandari*, 227 F.3d at 1163, 1168-1169; *Shah*, 220 F.3d at 1065, 1072, 1073.

The Ninth Circuit also routinely usurps the BIA's role in addressing withholding of removal. A finding by the BIA that the alien did not establish eligibility for asylum will be accompanied by an automatic denial of withholding of removal. This is so because the alien must meet a higher standard of proof for withholding of removal than for asylum eligibility. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421 (1987) ("well-founded fear" standard for asylum eligibility does not require satisfaction of the "more likely than not" standard for mandatory withholding). Under its recent cases, if the Ninth Circuit overturns the BIA's denial of an asylum application, the court often does not remand to the BIA for a new, independent determination regarding withholding of removal. Rather, the court makes its own

findings and usually awards withholding. The court sometimes seeks to justify its award of relief by invoking the presumption of future persecution that arises by regulation in administrative proceedings when there has been a finding of past persecution. 8 C.F.R. 208.13(b)(1), 208.16(b)(1); see *Aguirre-Cervantes* v. *INS*, 242 F.3d 1169, 1180-1181, vacated by stipulation, 273 F.3d 1220 (9th Cir. 2001); *Salaam*, 229 F.3d at 1240. Other times—as in this case, see App., *infra*, 14a-15a—the court seeks to justify its award of withholding of removal by the court's own assessment in the first instance of the evidence and its weight. See *Popova* v. *INS*, 273 F.3d 1251, 1260-1261 (9th Cir. 2001); *Ventura* v. *INS*, 264 F.3d 1150, 1158 (9th Cir. 2001); *Tagaga* v. *INS*, 228 F.3d 1030, 1035 (9th Cir. 2000); *Zahedi* v. *INS*, 222 F.3d 1157, 1168 (9th Cir. 2000).

In this case, the Ninth Circuit acknowledged that "it was reasonable for the BIA"—having found respondent's testimony untrustworthy—"not to address the merits of [respondent's] petition for asylum and withholding of removal." App., *infra*, 11a. But the court also concluded that "it is clear that we would be compelled to reverse [the BIA's] decision if it had decided the matter against [respondent]" and, furthermore, that its resolution of the merits was warranted because "[t]he incremental decision-making that may otherwise follow risks 'a series of unnecessary and inefficient remands, to the detriment of the party seeking relief.'" *Ibid.* (quoting *Navas* v. *INS*, 217 F.3d 646, 662 (9th Cir. 2000)). The court of appeals has invoked similar logic in other asylum cases in an effort to justify its resolution of issues that the BIA has not addressed. See *Salazar-Paucar* v. *INS*, 281 F.3d 1069, 1076 (9th Cir. 2002); *Popova*, 273 F.3d at 1259; *Ventura*, 264 F.3d at 1157; *Aguirre-Cervantes*, 242 F.3d at 1179-1180; *Bandari*, 227

F.3d at 1169; *Chand* v. *INS*, 222 F.3d 1066, 1078 (9th Cir. 2000).

The court of appeals' logic does not withstand scrutiny. In the first place, a bare administrative record may not enable a court to anticipate all the inferences that the BIA might reasonably draw from the record. See *Nader*, 426 U.S. at 304 (noting that agencies "are better equipped than courts" to address issues within their jurisdiction, "by specialization, by insight gained through experience, and by more flexible procedure") (internal quotation marks omitted); see also *Abovian*, 257 F.3d at 979 (Kozinski, J., dissenting from denial of rehearing en banc) ("We defer to the BIA in part because of its experience in hearing claims involving the conditions in foreign countries."). The Ninth Circuit's de novo decision-making also may implicate "a determination of policy or judgment which the agency alone is authorized to make," so that the "judicial judgment cannot be made to do service for an administrative judgment." *Chenery*, 318 U.S. at 88. Finally, even when the court determines that a particular BIA decision must be set aside (indeed, often precisely *because of* that determination), the court of appeals' assumption that there is a "complete administrative record" for making a final disposition of the case (App., *infra*, 11a) is often wrong. If the case were remanded to the BIA, the BIA would have the power to return it to the IJ for further fact-finding—in light of the court's decision—on issues that are unclear or were not completely addressed, or to refresh or supplement the evidence. See 8 C.F.R. 3.2. That reopening of the record would perhaps lead to a different result than the one that the court of appeals would find compelled by the initial, less complete record.

Nor can the court of appeals' de novo fact-finding be justified by a desire to prevent what it may regard as "unnecessary and inefficient" administrative proceedings on remand. See App., *infra*, 11a (quoting *Navas*, 217 F.3d at 662). In the first place, the court's apparent concern for the welfare of the asylum applicant (*ibid.*) is misplaced in this context. What the applicant seeks through his application is to remain in the United States rather than being returned to his home country. That relief is assured on an interim basis when the BIA's final order of removal has been vacated by a court and the matter is pending before an IJ or the BIA on remand. See 8 C.F.R. 3.6(a) (providing for automatic stay of removal when alien takes timely administrative appeal from IJ's order of removal).

Furthermore, Congress has charged the Attorney General, not the courts, with administering the immigration laws, see 8 U.S.C. 1103(a), and the Attorney General (acting through the BIA) accordingly must be given the first opportunity to determine what further proceedings may be required, and what (if any) further evidence may be relevant for a final disposition of the case once a reviewing court has "laid bare" (*FPC* v. *Idaho Power Co.*, 344 U.S. at 20) an error by the BIA. Aliens such as respondent are present in this country in "*an ongoing violation* of United States law," see *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999), and they accordingly have no right to remain unless the Attorney General grants them asylum or relief from removal under other provisions of the INA.

Relief from removal, moreover, is inherently prospective in nature and depends upon the circumstances at the time the Attorney General renders his decision. Where, for example, a reviewing court sets aside the

Attorney General's determination that an alien was not subjected in the past to persecution based upon a protected characteristic, the question of whether the alien would be subject to persecution in the future is prospective from the date of the court's decision. The Attorney General accordingly must be given an opportunity to address that question on the basis of information about the conditions the alien would experience in the country of removal *at that time*, which may be markedly different than what the alien would have experienced when the BIA rendered the administrative decision under review.[8]

The record in this case further disproves the court of appeals' assertion that its fact-finding merely anticipated what the BIA would be compelled to conclude if the case was remanded. The IJ specifically addressed the question of whether respondent would be entitled to eligibility for asylum or to withholding of removal if his testimony was credible. The IJ concluded that relief would *not* be justified. App., *infra*, 56a-57a. He explained that respondent's testimony (if believed) did not show that Chinese family-planning officials wanted to detain respondent in 1995 because of his wife's pregnancy. *Id.* at 56a. And even if respondent was beaten and detained by Chinese officials in Shanghai in 1996, nothing in the record suggests that those actions were

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[8] For example, the court of appeals determined in *Popova* v. *INS*, *supra*, that record evidence describing conditions in Bulgaria as of 1992 was sufficient, in 2001, for the court itself to decide questions about possible future persecution of an anti-communist activist who had left Bulgaria in 1991. See 273 F.3d at 1255, 1259-1261. In addition, the dated evidence on which the court relied itself suggested that conditions were beginning to "improve[]" for Bulgarian anti-communist activists even during the early 1990s. *Id.* at 1260.

taken on account of respondent's marriage or child. See *ibid.* Indeed, a reasonable inference might be that respondent was punished in Shanghai for leaving China illegally. Whatever might have been the case in 1996, moreover, the relevant question is what respondent would experience now if he was returned to China. Thus—and contrary to the holding of the court of appeals (*id.* at 11a)—it cannot be said that respondent's entitlement to relief is "clear," even from the existing administrative record.

c. Other circuits generally respect the BIA's role as fact-finder in immigration cases by remanding in similar situations, and their decisions thus conflict with the de novo approach taken by the Ninth Circuit. See, *e.g.*, *Begzatowski* v. *INS*, 278 F.3d 665, 671 (7th Cir. 2002) (remanding after reversing BIA finding of no past persecution); *Yang* v. *McElroy*, 277 F.3d 158, 162 (2d Cir. 2002) (noting that remand "recognizes that the [BIA] is the adjudicative body having primary responsibility and experience in asylum matters"); *Alvarado-Carillo* v. *INS*, 251 F.3d 44, 47 (2d Cir. 2001) ("[M]indful of the deference generally granted to the BIA, we remand to permit the BIA to re-evaluate petitioner's claim in light of this opinion."); *Stewart* v. *INS*, 181 F.3d 587, 595 n.6 (4th Cir. 1999); *Gailius* v. *INS*, 147 F.3d 34, 47 (1st Cir. 1998) (remand "is the appropriate remedy when a reviewing court cannot sustain the agency's decision because it has failed to offer legally sufficient reasons for its decision"); *Rhoa-Zamora* v. *INS*, 971 F.2d 26, 34 (7th Cir. 1992) ("We will not weigh evidence that the [BIA] has not previously considered; an appellate court is not the appropriate forum to engage in fact-finding in the first instance."), cert. denied, 507 U.S. 1050 and 508 U.S. 906 (1993).

3. The court of appeals' repeated failure to respect the BIA's reasonable findings of fact, and its de novo consideration of issues that the BIA reasonably has not addressed, present questions of substantial and recurring importance. Generally speaking, the question in an asylum case is whether an alien who does not meet the statutory or administrative requirements for being present in the United States will, despite that ineligibility, be permitted to remain in this country. Asylum cases therefore have obvious practical importance to individual aliens and to the government. Furthermore, these cases involve an exercise of authority over admission and removal of aliens, which "[c]ourts have long recognized * * * as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Shaughnessy* v. *Mezei*, 345 U.S. 206, 210 (1953); see *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977); *Kleindienst* v. *Mandel*, 408 U.S. 753, 766-767 (1972). Asylum decisions, like immigration decisions generally, are "vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power," and the definition of the national community. *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952). Such matters "are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Id.* at 589.

The Ninth Circuit's non-deferential review of BIA asylum decisions puts the judiciary in the position of making immigration decisions that are reserved to Congress and the Executive Branch. Asylum applications, moreover, are increasingly important to enforcement of the immigration laws. The government's certiorari petition in *INS* v. *Cardoza-Fonseca*, 480 U.S.

421 (1987) (No. 85-782), noted (at 19 n.10) that in Fiscal Year 1984 approximately 11,000 asylum applications were filed with the Justice Department's Executive Office for Immigration Review (EOIR). In Fiscal Year 2001, by contrast, EOIR received more than 60,000 asylum applications. See EOIR, *FY* 2001 *Asylum Statistics* 1 (Apr. 2, 2002), *available at* <http://www.usdoj.gov/eoir/efoia/FY01Asy Stats.pdf>.

The Ninth Circuit's size and geographic location exacerbate the problem. EOIR has calculated that its adjudicators complete approximately 50,000 to 75,000 cases presenting asylum claims annually. Approximately one third of those proceedings occur within the Ninth Circuit. Furthermore, asylum applicants whose claims fail before the BIA are disproportionately likely to seek judicial review if their appeal would lie with the Ninth Circuit. The result is that the Ninth Circuit now decides more asylum cases than all the other circuits *combined.* Data compiled by the Department of Justice show, for example, that in Fiscal Year 2001 federal courts of appeals decided 541 asylum cases, of which the Ninth Circuit decided 333, or 62%. The Ninth Circuit's departure from the judicial-review requirements of the INA therefore compromises enforcement of the immigration laws.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 2002

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-70478

YI QUAN CHEN, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT

Argued and Submitted May 10, 2001
Filed Sept. 11, 2001

Before: LAY,[1] TROTT and BERZON, Circuit Judges.

LAY, Circuit Judge:

This is an appeal from denial by the Board of Immigration Appeals ("BIA") of a Chinese citizen's application for asylum and withholding of removal pursuant to § 208(a) and § 241(b)(3) of the Immigration and Nationality Act ("I.N.A."), 8 U.S.C. §§ 1158(a), 1231(b)(3). We reverse and find the Petitioner is eligible for a discretionary grant of asylum, as well as a mandatory grant of withholding of removal.

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[1] The Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

I. Facts

Yi Quan Chen ("Chen") is a twenty-five year old citizen of the People's Republic of China ("China"). On October 5, 1994, Chen married Ai-Ling Jiang ("Jiang") in an informal ceremony. The marriage was not recognized by the Chinese government because they were not of legal marrying age. As a result, they could not obtain a permit to have children.

In February 1995, Jiang learned she was pregnant. When they went to the clinic for a pre-natal examination, family planning officials attempted to detain the Chens because they could not provide a marriage certificate, which is required to obtain a birth permit. The couple escaped and went to stay with relatives to hide from the officials. Family planning officials continued to search for them.

With the help of immigrant smugglers and a fraudulent passport, Chen fled to the United States in April 1995.[2] He was immediately apprehended and applied for asylum ("first application"). As grounds for his first application, Chen claimed that if he were returned to China, government authorities would persecute him on account of his and his father's pro-democracy activities. Chen did not state in his first application that family planning officials sought him for violating China's marriage and family planning laws because at that time, opposition to family planning policies was not a recognized basis for asylum. An Immigration Judge ("IJ") denied his first application and ordered him deported to China.

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[2] While Chen was in the United States, his son, Chen Zhifet was born. Jiang and Chen Zhifet continue to live in hiding in China.

Upon his return to China, government authorities apprehended and detained Chen, beating him so severely that he required prolonged hospitalization. About a month later, Chen escaped from the detention hospital and begged on the streets until he collected enough money to contact his relatives for help. An uncle brought Chen to his parents' home, but he soon left to protect them from harm. For the next two years, Chen lived in a small town where he worked at various unskilled jobs.

Chen returned to the United States in 1998 and again applied for asylum ("second application"), or in the alternative, withholding of removal, based on his resistance to China's family planning policies. Chen testified in support of his second application and submitted documentary evidence, including letters from family members and neighbors, as well as a family planning department notice requiring Chen's wife to appear for an abortion. Chen also submitted corroborating evidence of conditions in China, demonstrating how people who violate China's government policies, including its marriage and family planning laws, are continually repressed. An IJ conducted a hearing on the merits and concluded that Chen had not presented credible evidence in support of his second application. The IJ also held that Chen had submitted a frivolous asylum claim.

Chen appealed the denial to the BIA, which dismissed his appeal in a split decision. Contrary to the IJ, the BIA determined that Chen's claim was not frivolous. However, the BIA agreed with the IJ's conclusion that Chen lacked credibility and on that basis, denied his petition for asylum and withholding of removal.

II. Standard of Review

Where the BIA conducts an independent review of the IJ's findings, this court reviews the BIA's decision and not that of the IJ, except to the extent the IJ's opinion is expressly adopted. *Ghaly v. I.N.S*, 58 F.3d 1425, 1430 (9th Cir. 1995). In the instant case, the BIA found that Chen's testimony was not credible, and that he therefore failed to meet his burden of proving his eligibility for asylum and withholding of removal. The task of this court is to determine whether substantial evidence supports the finding of the BIA. *Sidhu v. INS*, 220 F.3d 1085, 1088 (9th Cir. 2000). In doing so, we independently evaluate each ground cited by the BIA for its finding. *See Shah v. INS*, 220 F.3d 1062, 1066-67 (9th Cir. 2000).

The factual findings underlying the BIA's adverse credibility determination will be upheld on review unless "any reasonable adjudicator would be compelled to conclude to the contrary." I.N.A. § 242(b)(4)(B), 8 U.S.C. § 1252(b)(4)(B) (Supp. II 1996). Although the substantial evidence standard for reviewing credibility findings by the BIA is deferential, the BIA must have a "'legitimate articulable basis to question the petitioner's credibility, and must offer a specific, cogent reason for any stated disbelief.'" *Shah*, 220 F.3d at 1067 (quoting *Osorio v. INS*, 99 F.3d 928, 931 (9th Cir. 1996)). Adverse credibility determinations based on minor discrepancies, inconsistencies, or omissions that do not go to the heart of an applicant's asylum claim cannot constitute substantial evidence. *See Akinmade v. INS*, 196 F.3d 951, 954 (9th Cir. 1999).

III. Asylum and Withholding of Removal

A. Background

To establish eligibility for asylum, a petitioner must show that he or she is a "refugee" within the meaning of I.N.A. § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A). I.N.A. § 208(b)(1), 8 U.S.C. § 1158(b)(1) (Supp. II 1996). A refugee is defined as a person who is unwilling or unable to return to his home country because he has experienced past persecution or has a well-founded fear of future persecution on account of his race, religion, nationality, membership in a particular social group, or political opinion. I.N.A. § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (Supp. II 1996). Resistance to coercive family planning measures is expressly included within the "political opinion" ground for asylum. 8 U.S.C. § 1101(a)(42)(B) (Supp. II 1996).

An application for asylum made in removal proceedings is also considered a request for withholding of removal. I.N.A. § 241(b)(3), 8 U.S.C. § 1231(b)(3) (Supp. II 1996); *see also* 8 C.F.R. § 208.3(b) (2000). However, the applicant must meet a stricter standard of proof for this relief, "in part because an applicant who meets that standard is not only eligible for, but entitled to, such relief." *Navas v. INS*, 217 F.3d 646, 655 (9th Cir. 2000). Withholding of removal will be granted where an applicant establishes a "clear probability" that he or she would be persecuted if returned to his or her home country. *Id.* In other words, an applicant must establish it is "more likely than not" he or she will be persecuted on a statutorily-protected ground. *Id.*

An applicant's testimony alone may be sufficient to meet the burden of proving past persecution if such testimony is candid, credible, and sincere. *Kataria v.*

INS, 232 F.3d 1107, 1114 (9th Cir. 2000). To meet the burden of showing a well-founded fear of future persecution, an applicant must demonstrate that his or her fear is both subjectively genuine and objectively reasonable. *Id.* at 1113.

The BIA dismissed Chen's appeal on grounds that the record adequately supported the IJ's adverse credibility findings. The BIA based its decision on three factors: (1) Chen's admission that his first application for asylum contained a fraudulent notarial birth certificate; (2) Chen's submission of two distinct asylum applications; and (3) a general finding of inconsistency and vagueness. Because it found his application not to be credible, the BIA did not address the merits of Chen's application for asylum and withholding of removal.

We find that the shortcomings upon which the BIA relied were insufficient grounds for its adverse credibility finding in this case. *See Shah*, 220 F.3d at 1068 (stating that if discrepancies cannot be viewed as attempts by the asylum applicant to enhance his or her claims of persecution, they have no bearing on credibility); *Akinmade*, 196 F.3d at 955 (finding that fraudulent documents presented for matters incidental to claims of persecution do not undermine an applicant's overall credibility because they do not go to the heart of the asylum claim). We further find that Chen established his eligibility for asylum and withholding of removal with credible, direct and specific evidence of past persecution, a well-founded fear of future persecution, and the clear probability that he would be persecuted if returned to China.

B. Credibility

1. Counterfeit Birth Certificates

The record confirms that the two notarial birth certificates Chen submitted with his first application state he was born in 1979, although the birth certificate submitted with his second application lists his correct birth year, 1975. The BIA cited this documentary evidence, and the fact that Chen did not explain or rebut their counterfeit nature, in finding Chen not to be credible. We find that the birth certificates are not a legitimate basis for an adverse credibility finding in this case.

First, the BIA discounted Chen's credibility because he did not explain or rebut the counterfeit nature of these documents. However, Chen was in fact forthright when asked whether he knew the original birth certificate was fraudulent: he testified that he did not and that perhaps his relatives had made a mistake when applying for the documents. We find no evasiveness in this answer. In *Shah*, 220 F.3d at 1068, this court would not uphold an adverse credibility finding based on a discrepancy between the date listed on the death certificate of the petitioner's husband and the date of death identified by the petitioner in her testimony. We reasoned that because "the discrepancy [was] capable of being attributed to a typographical or clerical error," it could not form the basis of an adverse credibility finding. *Id.* Here, as in *Shah*, "[t]here are any number of reasons to account for" the discrepancies between the dates in the birth certificates submitted in Chen's first and second applications. *See id.* As the dissent to the BIA's majority opinion noted in this case, by not considering Chen's explanation, the IJ and the majority

ignored well-established precedent that testimonial evidence may be the most important and dispositive part of any asylum claim.

More importantly, if discrepancies "cannot be viewed as attempts by the applicant to enhance his claims of persecution [they] have no bearing on credibility." *Damaize-Job v. INS*, 787 F.2d 1332, 1337 (9th Cir. 1986); *see also Vilorio-Lopez v. INS*, 852 F.2d 1137, 1142 (9th Cir. 1988) (stating "[m]inor inconsistencies in the record such as discrepancies in dates which reveal nothing about an asylum applicant's fear for his safety are not an adequate basis for an adverse credibility finding"). The only stated purpose of the birth certificates in Chen's first application was to determine whether he should be detained as an adult or a minor. The purpose of the notarial certificate in his second application is simply to establish Chen's identity and his date of birth. In neither instance do the birth certificates enhance his claims for asylum. These documents were incidental to Chen's claims for asylum in his first and second applications and reveal nothing about his fear for his safety. *See Akinmade*, 196 F.3d at 954.

Because there are any number of reasons to account for the discrepancies in the birth certificates and these documents do not go to the heart of Chen's claim, they cannot form the basis for an adverse credibility finding.

2. Inconsistent Applications

In finding Chen not to be credible, the BIA also cited inconsistencies in the grounds upon which Chen based his first and second asylum applications. Specifically, Chen's first application was based upon his and his father's pro-democratic activities, and his second application cited China's coercive population control as basis

for relief. Also, in his first application Chen identified himself as single, and in his second application he identified himself as married. All plausible and reasonable explanations for any inconsistencies must be considered. *See Osorio v. INS*, 99 F.3d 928, 932 (9th Cir. 1996). In doing so, we find that the factors articulated by the BIA do not support an adverse credibility finding.

Chen explains that he based his first asylum application on pro-democracy grounds because resistance to China's population control policies was not a viable basis for an asylum claim in 1995. Accordingly, in that application he cited his flight from political oppression of his and his father's democratic views, which provided a stronger legal basis for asylum at that time. However, at the time of his second application in 1999, resistance to China's population control policies was a viable basis for an asylum claim. Because his first application on pro-democracy grounds failed and he was also fleeing due to his family planning views, Chen cited the latter ground in his second application.[3] We fail to see how Chen's observance of immigration law constitutes a basis for finding him not to be credible. The BIA majority itself admitted as much when it acknowledged that such an explanation was more than reasonable in light of the state of the law in 1995.

Chen acknowledges that he was inconsistent in reporting his marital status on his first and second applications. He explains that he marked "single" on

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[3] We note that the BIA acknowledged Chen's persecution on account of his political activities and his violation of coercive population control policies in reversing the IJ's finding that the second application was frivolous.

his first application, but "married" on his second application because of his confusion about how to characterize his marriage in light of the Chinese government's view that his marriage was not official. Here again, Chen's explanation is more than reasonable and insufficient grounds exist upon which to find him not to be credible.

3. General Inconsistency and Vagueness

Finally, we disagree that Chen's second application and testimony was otherwise inconsistent or vague. Contrary to the findings of the IJ and BIA, a close reading of his testimony reveals that his statements about the officials who beat him, his whereabouts after he escaped from the hospital, and the residence of his wife and son were credible and consistent throughout the application process. Moreover, even though Chen did not spontaneously mention his wife's family planning notice when testifying in support of his second application, that does not discredit him. First, the notice was already in evidence and second, he acknowledged the notice when asked. Finally, Chen's descriptions about his escape from family planning officials was [*sic*] concrete and consistent throughout his testimony. The BIA failed to provide the requisite specific, cogent reason for discrediting Chen on this basis. In light of his concrete and consistent testimony, the BIA's general speculation and conjecture about the plausibility of his account does not suffice to find him not to be credible.

For these reasons, the BIA's adverse credibility finding is reversed. Given our finding of Chen's credibility, his statements should be accepted as true. *See Kataria*, 232 F.3d at 1113.

Because the BIA did not consider whether Chen had established eligibility for asylum or withholding, the INS contends that we must remand to the BIA to consider the merits of Chen's claim. However, based on sound principles of administrative law and jurisprudence, we generally "do not remand a matter to the BIA if, on the record before us, it is clear that we would be compelled to reverse its decision if it had decided the matter against the applicant." *Navas*, 217 F.3d at 662; *see also Gafoor v. INS*, 231 F.3d 645, 656 n.6 (9th Cir. 2000). The incremental decision-making that may otherwise follow risks "a series of unnecessary and inefficient remands, to the detriment of the party seeking relief." *Navas*, 217 F.3d at 662.

We recognize that based on its adverse credibility finding, it was reasonable for the BIA not to address the merits of Chen's petition for asylum and withholding of removal. However, a review of the complete administrative record before us allows us to properly evaluate Chen's claim for relief.

C. Past Persecution and Well-Founded Fear of Future Persecution

A petitioner's past persecution and his well-founded fear of future persecution are alternative grounds upon which a petitioner can prove his or her eligibility for asylum. I.N.A. §§ 101(a)(42)(A), 208(a), 8 U.S.C. §§ 1101(a)(42)(A), 1158(a) (Supp. II 1996). For purposes of analyzing a claim for relief under the I.N.A., "persecution" is the infliction of suffering or harm upon those who differ in a way regarded as offensive. *Pitcherskaia v. INS*, 118 F.3d 641, 647 (9th Cir. 1997). This is an objective definition, which turns on what a reasonable person would find "offensive." *See id.* A

petitioner who establishes past persecution is presumed to have a well-founded fear of future persecution. 8 C.F.R. § 208.13(b) (2000).[4]

To establish asylum eligibility on the basis of past persecution, an applicant must demonstrate "(1) an incident, or incidents, that rise to the level of persecution; (2) that is 'on account of' one of the statutorily-protected grounds; and (3) is committed by the government or forces the government is either 'unable or unwilling' to control." *Chand v. INS*, 222 F.3d 1066, 1073 (9th Cir. 2000) (citing *Navas*, 217 F.3d at 655-56).

As for the first part of this test, the undisputed facts in the record show that upon returning to China, government officials beat Chen to the point where he required hospitalization. He bears the scars of this physical punishment to this day. Importantly, the detention hospital not only treated his injuries, but also detained him from freedom, as illustrated by his escape through a window. We find that this incident rises to the level of persecution.

Next, Chen must meet two requirements to show that he was persecuted "on account of" his political opinion about China's family planning policies. First, Chen must establish that he held, or that his persecutors believed that he held, a political opinion. *INS v. Elias-Zacarias*, 502 U.S. 478, 482-83, 112 S. Ct. 812, 117 L.Ed.2d 38 (1992). Second, he must show that he was

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[4] This presumption may be rebutted where the I.N.S. shows by a preponderance of the evidence that the conditions in the petitioner's home country have significantly changed. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431, 107 S. Ct. 1207, 94 L.Ed.2d 434 (1987). There is no evidence in the record suggesting such changes have occurred in China.

persecuted because of his political opinion. *Id.* at 483-84, 112 S. Ct. 812.

The record shows that Chen was married and conceived a child without the permission of the Chinese government. We find that these two acts in deliberate contravention of Chinese law show that Chen held a political opinion that contradicted Chinese law—namely, Chen's political opinion is based on freedom to create one's own family. In light of these two blatant acts of defiance, there is little doubt that Chinese family planning officials believed that Chen held this opinion. It is also clear that Chinese officials persecuted Chen because of his political opinion. When family planning notified the Chens of their violation and ordered Jiang to appear for an abortion, the Chens fled. Authorities continued to search for the couple. When he returned to China after his first petition for asylum was denied, Chinese officials finally caught Chen and punished him for evading the family planning laws. This persecution, based upon his resistance to China's family planning policies, is a statutorily-protected ground upon which Chen may seek asylum. *See* I.N.A. § 101(a)(42)(B), 8 U.S.C. § 1101(a)(42)(B) (Supp. II 1996).

Finally, it is evident that Chen suffered this persecution at the hands of the Chinese government. The record shows that family planning authorities persecuted Chen. In China, such authorities are employed by the government. Chen also was detained, beaten, and pursued by government security forces. After he escaped, government authorities continued to search for him. This history satisfies the third requirement that Chen must meet to establish past persecution in order to be eligible for a discretionary grant of asylum in the United States. As we have stated, because we

find that Chen has credibly established he was persecuted in the past, we also find that his fear of future persecution is well-founded, offering an alternative ground upon which his petition for relief may be granted.

Having established past persecution, Chen is entitled to a presumption that his fear of future persecution is well-founded. Notwithstanding this presumption, we also find that Chen meets the subjective and objective elements of proving his well-founded fear. Chen credibly testified that he has been pursued and beaten by Chinese authorities and that he genuinely fears he will face more of the same if he returns to that country. In addition to this subjective fear, we find that his fear is objectively reasonable in light of the facts of this case.

D. Clear Probability of Future Persecution

In addition to finding that Chen is eligible for a discretionary grant of asylum, we also find that Chen meets the standard of proving that he is eligible for withholding of removal. The record shows a clear probability—or more than a fifty percent chance—that he would be persecuted if he were returned to his home country. *See Lim v. INS*, 224 F.3d 929, 938 (9th Cir. 2000).

Chinese officials relentlessly pursued Chen after he and Jiang became pregnant. In addition to issuing a family planning notice requiring Jiang to appear for an abortion, they pursued the couple physically, searching for them at relatives' homes in the countryside. These actions were not idle threats, which became evident when they caught Chen and beat him unconscious. He has now fled China two times, which is a violation of

Chinese law in itself. If he were to return to China, there is little doubt—and certainly more than a fifty percent chance—that his persecutors would continue to inflict emotional and physical punishment for his contravention of the family planning laws. For these reasons, we find that Chen is also entitled to withholding of deportation.

IV. Conclusion

Our finding that Chen has credibly demonstrated his eligibility for relief does not automatically entitle him to asylum. Once it is determined that an applicant is statutorily eligible for asylum, the next inquiry "is whether the eligible applicant is *entitled* to asylum as a matter of discretion." *Kazlauskas v. INS*, 46 F.3d 902, 905 (9th Cir. 1995); *see also* 8 U.S.C. § 1158(a) (Supp. II 1996). Under § 1158(a), the Attorney General has the discretionary authority to grant asylum. *Yang v. INS*, 79 F.3d 932, 935 (9th Cir. 1996). We remand this part of Chen's claim for the Attorney General to determine, in the exercise of his discretion, whether to grant asylum to Chen.

In view of the confinement and persecution Chen suffered and his genuine fear that he will be persecuted if returned to China, we deem it only just and equitable that Chen be granted withholding of removal. This relief is mandatory. We therefore grant his petition for withholding of removal.

PETITION FOR REVIEW GRANTED; APPLICATION FOR WITHHOLDING OF DEPORTATION GRANTED; APPLICATION FOR ASYLUM REMANDED (for the exercise of the Attorney General's discretion).

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
DECISION OF THE BOARD OF
IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

FILE No. A77 234 212 - FLORENCE

IN THE MATTER OF
YI QUAN CHEN, RESPONDENT

[Date: Apr. 10, 2000]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF SERVICE: Monika Sud-Devaraj
Assistant District
Counsel

CHARGE:

Notice: Sec. 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)]-
No valid immigration visa

APPLICATION: Asylum; withholding of removal

In a decision rendered on June 7, 1999, an Immigration Judge denied the respondent's application for asylum and withholding of removal pursuant to section 208(a) and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(a), 1231(b)(3). The respondent

has filed an appeal challenging this decision. We will dismiss the respondent's appeal.

I. Factual Background

The respondent, a native and citizen of the People's Republic of China, bases his asylum application on his opposition to China's coercive population control policies. The respondent presented evidence that in February of 1995, family planning authorities threatened to terminate his wife's pregnancy and shortly thereafter began searching for the respondent. Fearing for his safety, the respondent stayed at a nearby relative's for several weeks and then made plans to come to the United States. After arriving in the United States in April of 1995, the respondent applied for asylum based on his pro-democracy political activities from 1990 until 1995. *See* Exh. 9. An Immigration Judge denied the respondent's asylum application and ordered him deported to China. Upon his return to China, officials allegedly beat the respondent which resulted in his hospitalization for month. The respondent escaped from the hospital, went into hiding for several years, and then returned to the United States in 1998, and applied for asylum.

II. Immigration Judge's Decision

The Immigration Judge concluded that the respondent had not presented credible evidence in support [*sic*] his claim. In addition, the Immigration Judge held that the respondent had submitted a "frivolous asylum claim" (I.J. at 7-10). On appeal, the respondent argues that the Immigration Judge's adverse credibility [*sic*] is erroneous. We find the record adequately supports the Immigration Judge's decision regarding the adverse credibility of the respondent. However, we disagree

with the Immigration Judge's conclusion regarding the submission of a "frivolous asylum claim."

III. Asylum and Withholding of Removal

Section 208(a) of the Act provides that an alien applying for asylum relief must demonstrate that he is a "refugee" as defined under section 101(a)(42)(A) of the Act, 8 U.S.C. § 1101(a)(42)(A). *See* section 208(a) of the Act, 8 U.S.C § 1158(a); 8 C.F.R. § 208.13; *see also INS v. Elias-Zacarias*, 502 U.S. 478 (1992); *INS v. Cardoza-Fonseca, supra*; *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987). That definition requires that an alien demonstrate that he is unwilling or unable to return to his country because of past persecution or a "well-founded fear" of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. *See Zhang v. Slattery*, 55 F.3d 732, 737-8 (2d Cir. 1995). We have held that an asylum applicant has established a "well-founded fear" if he shows that a reasonable person in his circumstances would fear persecution for one of the five grounds specified in the Act. *See INS v. Cardoza-Fonseca, supra*; *INS v. Stevic*, 467 U.S. 407 (1984); *Matter of Mogharrabi*; *supra*; *see also Guevara-Flores v. INS*, 786 F.2d 1242 (5th Cir. 1986). In addition to being statutorily eligible, the alien must show that he merits a grant of asylum as a matter of discretion. *See* section 208(a) of the Act; *see also Lopez-Galarza v. INS*, 99 F.3d 954 (9th Cir. 1996).

In order to qualify for withholding of removal, an alien must demonstrate that his "life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion." Section 241(b)(3) of the Act, 8 U.S.C. § 1231(b)(3). An alien must establish a "clear

probability" of persecution on account of one of the enumerated grounds. *See INS v. Stevic*, *supra*, at 413; *Zhang v. Slattery*, *supra*, at 738. This clear probability standard requires a showing that it is more likely than not that an alien would be subject to persecution. *Id.* at 429-30. The relief of withholding of removal is mandatory, in that once an alien has established that he qualifies for relief under section 241(b)(3) of the Act, 8 U.S.C. § 1231(b)(3), such relief must be granted.

An applicant for asylum bears the burden of proof of establishing his eligibility for the relief sought. *Matter of Dass*, 20 I&N Dec. 120 (BIA 1989); *see Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985), modified on other grounds, *Matter of Mogharrabi*, *supra*; 8 C.F.R. §§ 208.13(a), 242.17(a)(4)(iii) (1996). An alien's testimony alone may be sufficient to meet his burden of proof. However, the testimony must be believable, consistent, and sufficiently detailed to provide plausible and coherent account of his claim in order to do so. *See Nsukami v. INS*, 890 F. Supp. 170 (E.D.N.Y. 1995); *Matter of S-M-J-*, Interim Decision 3303 (BIA 1997); *Matter of Dass, supra*; *Matter of Mogharrabi, supra.* A persecution claim which lacks veracity cannot satisfy the burdens of proof and persuasion necessary to establish eligibility for asylum and withholding of removal relief. *See Matter of Mogharrabi, supra*; 8 C.F.R. §§ 208.1.6(b). Moreover, an Immigration Judge's credibility determination is given significant deference by this Board since he or she is in the best position to observe a witness' demeanor. *See Estrada v. INS*, 775 F.2d 1018 (9th Cir. 1985); *Matter of A-S-*. Interim Decision 3336 (BIA 1998)[1]; *Matter of Pula*, 19

[1] In particular, this Board will defer to an adverse credibility finding where a review of the record reveals that (1) the dis-

I&N Dec. 467 (BIA 1987) (significant deference is given to Immigration Judge's credibility findings when the basis for those findings are [*sic*] articulated); *see Matter of Burbano*, 20 I&N Dec. 872 (BIA 1994). If the record contains documents which appear to be counterfeit, and their incredibility is neither explained or rebutted, the respondent's asylum claim may be regarded as lacking in overall credibility. *See Matter of O-D-*, Interim Decision 3334 (BIA 1998).

As pointed out by the Immigration Judge in his decision, the record contains documentary evidence which has been determined to be counterfeit by the Immigration and Naturalization Service. *See* Exh. 11. The respondent has not explained or rebutted the counterfeit nature of these documents. *See Matter of O-D-, supra; Matter of A-S-, supra.*

In addition, the record contains two asylum applications. It appears that the respondent submitted an asylum application in 1995 and a second application in 1998. *See* Exhs. 2, 9. Upon comparing the two applications, they appear to provide inconsistent information with respect to critical aspects of the respondent's claim. For example, in the respondent's 1995 application, he recorded single as his marital status while in his 1998 written asylum application (Form I-589) and during direct examination, the respondent indicated that

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crepancies and omissions described by the Immigration Judge are actually present; (2) these discrepancies and omissions provide specific and cogent reasons to conclude that the alien provided incredible testimony; (3) a convincing explanation for the discrepancies and omissions has not been supplied by the alien. Furthermore, this Board will defer to an Immigration Judge's finding of incredibility based on demeanor especially where such inference is supported by the record. *See Matter of A-S-, supra.*

he married his wife on October 5, 1994. In addition, the respondent testified at the instant hearing that he left China in 1995 because he feared family planning officials would persecute him (Tr. at 45). However, the respondent's 1995 application did not mention coercive population control as a basis of relief.

We also find that the respondent's testimony at the instant hearing appeared inconsistent and vague. For instance, he stated that he does not know where his wife currently resides (Tr. at 43). The respondent later testified that his wife and son are living together with his in-laws (Tr. at 44). The respondent also stated that after family planning authorities learned of the pregnancy, they attempted to arrest the respondent and he escape by out running the officials (Tr. at 48-50). In addition, the respondent provided a notice from family planning officials ordering his wife to appear for an abortion. *See* Exh. 6. However, a review of the record reveals that the respondent did not mention this notice or any particulars with regard to it. Based on the counterfeit documents of record, the respondent's inconsistent testimony, and the lack of explanation by the respondent, we find sufficient basis to affirm the Immigration Judge's adverse credibility finding. We do not find the respondent's allegation convincing and conclude that he has not sustained the applicable burden of proof for asylum.

Inasmuch as the respondent has failed to satisfy the lower statutory burden of proof required for asylum, it follows that he also has failed to satisfy the clear probability standard of eligibility required for withholding of removal. *See INS v. Stevic*, 467 U.S. 407 (1984). The evidence does not establish that if the respondent were now to return to China, it is more

likely than not that he would be subject to persecution on account of race, religion, nationality, social group, or political opinion. See section 241(b)(3) of the Act, 8 U.S.C. § 1231(b)(3).

IV. Frivolous Asylum Application

The Immigration Judge found that the respondent submitted a frivolous asylum application in violation of section 208(d)(6) of the Act. *See* 8 U.S.C. § 1158(d)(6). Section 208(d)(6) provides that an alien who knowingly makes a frivolous asylum application, after receiving notice, shall be permanently ineligible for any benefits under the Act. The respondent received the warning regarding the submission of a frivolous asylum application (Tr. at 18). However, we find that a "frivolous asylum application" finding may not be justified under the instant circumstances.

Applicable regulations provide that "an asylum application is frivolous if any of its material elements is deliberately fabricated. Such finding shall only be made if the immigration judge or the Board is satisfied that the applicant, during the course of proceedings, has had sufficient opportunity to account for any discrepancies or implausible aspects of the claim." 8 C.F.R. § 208.18. In light of the harsh consequences which may result from the filing of a "frivolous asylum application," a finding under section 208(d)(6) of the Act must be particular and closely scrutinized. *See Matter of Healy and Goodchild*, 17 I&N Dec. 22 (BIA 1979). The Immigration Judge concluded that the respondent submitted a "frivolous asylum application" because his 1995 application was based on political activities while his 1999 application focused on coercive population control. Moreover, the respondent did not mention his prior political activities during his 1999 hearing. Based on

these factors, the Immigration Judge made a "frivolous asylum application" finding (I.J. at 7-10).

The record reflects that the respondent explained that he did not mention coercive family planning policies in his 1995 asylum application upon the advice of his then counsel (Tr. at 68, 90). *See* Exh. 2. Considering the state of the law at that time, with particular reference to our decision in *Matter of Chang*, 20 I&N Dec. 38 (BIA 1989) which was later overruled by section 601 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of P.L. No. 104-208, 110 Stat. 3009-546, 3009-586 ("IIRIRA"), it is understandable why the respondent, upon the direction of counsel, would not submit an asylum application based on China's family planning policies. We also note that the respondent testified at the instant hearing that in 1995 he suffered persection on account of *both* his political activities and his violation of coercive population control policies (Tr. at 90-91). In addition, Part H the 1995 asylum application in the record has not been signed by the respondent as required when the respondent presents his application for examination. *See* Exh. 9. Finally, the record does not contain sufficient evidence of deliberate fabrication of material elements as required under applicable regulations. In particular, the material aspects of the respondent's applications do not contradict one another simple because they are not identical or even based on the same circumstances. It would be unfair to require an applicant, under the instant circumstances, to defend a strategic decision to not pursue a particular basis for asylum relief in a prior application where the prior law definitively dismissed such claims on grounds of statutory ineligibility. Accordingly, we do not find

sufficient evidence to support a finding of a "frivolous asylum application" under section 208(d)(6) of the Act.

V. Conclusion

In sum, we hold that the evidence presented does not satisfy the applicable burden of proof for either asylum or withholding of removal under the Act. However, the finding of a "frivolous asylum application" is not adequately supported by the instant record. Accordingly, we overrule the Immigration Judge's findings with regard to the filing of a "frivolous asylum application" and enter the following order.

ORDER: The respondent's appeal is dismissed.

FURTHER ORDER: The Immigration Judge's order finding the respondent to have filed a frivolous asylum application under 208(d)(6) of the Immigration and Nationality Act is vacated.

/s/ FRED M. VOCCO
FRED M. VOCCO
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
DECISION OF THE BOARD OF
IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

FILE No. A77 234 212 - FLORENCE

IN THE MATTER OF
YI QUAN CHEN, RESPONDENT

[Date: Apr. 10, 2000]

CONCURRING/DISSENTING OPINION

BY: LORY D. ROSENBERG

I respectfully concur in part and dissent in part.

The respondent's political asylum claim is based upon his experiences and fears related to coercive population control policies in the People's Republic of China. Although I agree with the majority's conclusions regarding the respondent's "non-frivolous" asylum application, I disagree with their reliance on *Matter of O-D-*, 21 I&N 1079 (BIA) and *Matter of A-S-*, 21 I&N Dec. 1106 (BIA 1998) and *Matter of A-S-*, 21 I&N Dec. 1106 (BIA 1998) to affirm an untenable adverse credibility finding.

The conclusions adopted by the majority are not supported by the record. In particular, the majority surmises that documents previously submitted by the

respondent in connection with another asylum application are fraudulent and therefore finds his present application to be unreliable. However, as discussed below, the facts do not warrant such a conclusion, because these documents are only incidental to the application which is the subject of our review. Moreover, the respondent did not procure these documents. It is unreasonable to hold him accountable for discrepancies which may have occurred because of misinformation or bureaucratic error.

In addition, the Immigration Judge and the majority rely on content of an asylum application submitted by the respondent[] during a prior unrelated hearing to cast doubt on his current application. A comparison of these applications reflects that they contain no explicit or implicit discrepancies regarding the merits of the case now before us. They simply complement one another. More important, and significantly more persuasive, is the fact that in the record before us for appellate review, the respondent presented clear, consistent, and coherent testimony regarding the actions of Chinese birth control officials from 1995 until 1998. Therefore, no cogent reasons exist for an adverse credibility finding with respect to his testimony.

The respondent presented sufficient evidence of past persection and a well-founded fear of persecution under section 208(a) of the Immigration and Nationality Act, as well as the probablity of persecution under the Act and the Convention Against Torture. Accordingly, I must dissent.

1. FACTUAL AND PROCEDURAL BACKGROUND

The respondent initially arrived in the United States in April of 1995 from China, and requested asylum

under section 208 of the Immigration and Nationality Act, 8 U.S.C. §1158. He submitted two applications for asylum, one in 1995, following his first arrival, and one in 1998, following his second arrival.

The respondent's 1995 asylum application indicated that his father participated in the 1989 pro-democracy movement (Exh. 9). He further stated officials fired his father from his elementary school teacher position because of his pro-democracy activities. Chinese officials also detained the respondent's father for 6 months after which they warned him to cease his participation in any pro-democracy events.

As a result of his father's influence and leadership, the respondent decided to become politically active. In 1995, the respondent assisted his father with the hanging of red lanterns tied with pro-democracy slogans. Several villagers saw the respondent and his father with the red lanterns. The police sent out a bulletin requesting any information about the red lanterns and the pro-democracy propaganda. Officials arrested the respondent's father a few days later, but fortunately the respondent was not home when the officials made their unannounced visit.

Upon learning about his father's plight, the respondent decided to flee China and came to the United States in search of safety. An Immigration Judge denied the 1995 application which was based only on the respondent's political activities. The respondent returned to China in June of 1996.

When the respondent returned to China, the police placed him in custody. The respondent explained in his 1998 asylum application that officials were not only interested in him because of his pro-democracy activi-

ties with his father, but because his wife had become pregnant in 1995 and the couple had refused to undergo any family planning intervention, including submission to an abortion or sterilization.

The respondent suffered a serious beating at the hands of a detention center employee. As a result of his beating, the respondent was hospitalized for 1 month. The respondent escaped from the hospital and went into hiding because he learned that family planning officials were still searching for him. From 1996 to 1998, the respondent moved from China in order to dodge family planning officials. In fact, he visited with his family only once for about 15 minutes in 1997. The respondent eventually returned to the United States in September of 1998 once again seeking asylum (Exh. 2).

II. CREDIBILITY

In *Matter of A-S-*, *supra*, the Board articulated a three-prong approach to assessing Immigration Judge credibility findings. The Board held that it generally will defer to an adverse credibility determination based upon inconsistencies and omissions regarding events central to an alien's asylum claim where a review of the record reveals that (1) the discrepancies and omissions described by the Immigration Judge are actually present; (2) these discrepancies and omissions provide specific and cogent reasons to conclude that the alien provided incredible testimony; and (3) a convincing explanation for the discrepancies and omissions has not been supplied by the alien. *Id.* at 5.

The Board's test for reviewing credibility findings derives principally from the approach developed and articulated by the United States Court of Appeals for the Ninth Circuit, which has been adopted with ap-

proval and followed in several other jurisdictions. The question before us in the instant case is: to what extent is the Board going to follow what we said in *Matter of A-S-*, *supra*, and to what extent is the Board going to determine cases based on some unarticulated and unpronounced "understanding" of "what we meant."

A. Controlling law governing credibility determinations

As the Ninth Circuit has indicated, an Immigration Judge's adverse credibility determination should "constitute[s] [*sic*] the beginning and not the end of our inquiry." *Aguilera-Cota v. INS*, 914 F.2d 1375, 1382 (9th Cir. 1990), citing *Vilorio-Lopez v. INS*, 852 F.2d 1137, 1142 (9th Cir. 1988); *see also Lopez-Reyes v. INS*, 79 F.3d 908, 911 (9th Cir. 1996). As an administrative tribunal having a greater latitude and authority to review such determinations than the federal courts, we should abide, at a minimum, by the principle that "[w]e do not accept blindly an IJ's conclusion that a petitioner is not credible." *Id. See also Matter of Y-B-*, Interim Decision 3337 (BIA 1998) (Rosenberg dissenting).

The federal courts have held that in adjudicating an asylum claim, an Immigration Judge and/or the Board must have a "legitimate articulable basis" to question an applicant's credibility, and must offer specific and cogent reasons for any stated disbelief. *See, e.g., Chang v. INS*, 119 F.3d 1055, 1067 (3d Cir. 1997); *de Leon-Barrios v. INS*, 116 F.3d 391, 393 (9th Cir. 1997); *Hamzehi v. INS*, 64 F.3d 1240 (8th Cir. 1995); *Damaize-Job v. INS*, 787 F.2d 1332, 1338 (9th Cir. 1986). The reasons provided by the adjudicator must be substantial and must bear a legitimate nexus to the adverse credibility determination. In other words, there must be a

"rational and supportable connection" between the Immigration Judge's reasons for disbelief and the conclusion that an applicant is incredible. *See e.g. Osorio v. INS*, 99 F.3d 928, 931 (9th Cir. 1996); *Mosa v. Rogers*, 89 F.3d 601, 604 (9th Cir. 1996); *Paredes-Urrestarazu v. INS*, 36 F.3d 801, 820 (9th Cir. 1994); *Vilorio-Lopez v. INS*, *supra*, at 1141; *Aguilera-Cota v. INS*, *supra*, at 1381.

Specifically, the courts have held that trivial errors, minor inconsistencies, and minor omissions by an asylum applicant are not valid grounds upon which to base an adverse credibility finding, *Osorio v. INS*, *supra*, at 931; *Vilorio-Lopez v. INS*, *supra*, at 1142; *Martinez-Sanchez v. INS*, 794 F.2d 1396, 1400 (9th Cir. 1986); *Aguilera-Cota v. INS*, *supra*, at 1381. Similarly, conjecture, unfounded assumptions, or improper inferences by the Immigration Judge or the Board do not constitute legitimate bases for finding an asylum applicant to lack credibility. *See e.g., Cordero-Trejo v. INS*, 40 F.3d 482, 489-91 (1st Cir. 1994); *Turcios v. INS*, 821 F.2d 1396, 1399 (9th Cir. 1987); *Del Valle v. INS*, 776 F.2d 1407, 1413 (9th Cir. 1985); *Nasseri v. Morschorak*, *supra*, at 604; *Lopez-Reyes v. INS*, *supra*, at 911.

Furthermore, any discrepancies, inconsistencies, or omissions relied upon by the adjudicator to support the conclusion that an asylum applicant is not credible must go to the heart of the asylum claim. *Ceballos-Castillo v. INS*, 904 F.2d 519, 520 (9th Cir. 1990); *Aguilera-Cota v. INS*, *supra*, at 1381. At least in the Ninth and Third circuits, absent an explicit finding that a particular statement is not credible, an applicant's testimony is accepted as true. *See, e.g., Chang v. INS*, *supra*, at 1067; *Prasad v. INS*, 101 F.3d 614 (9th Cir. 1996); *Hartooni v. INS*, 21 F.3d 336, 342 (9th Cir. 1994); *see*

also Shirazi-Parsa v. INS, 14 F.3d 1424, 1427 (9th Cir. 1994) (holding that Board's decision "cannot be mere boilerplate," but must describe with "sufficient clarity and detail" reasons for denial of asylum).

As we stated in *Matter of A-S-*, *supra*, at 4, "[i]t is axiomatic that the Board has the authority to employ a de novo standard of appellate review in deciding the ultimate disposition of the case[,]" and we accordingly retain our general prerogative to engage in an independent review of the record. *See e.g., Matter of Burbano*, 20 I&N Dec. 872 (BIA 1994). *But see* n.1, *supra*. Consequently, deference is warranted *only* in cases where the Immigration Judge's decision articulates a legitimate basis to question an applicant's credibility and provides specific and cogent reasons, going to the heart of the applicant's claim, that constitute a rational and supportable connection between the reasons for disbelief and the conclusion that an applicant is not credible.

Therefore, although we may defer to an Immigration Judge's adverse credibility finding where it is appropriate to do so, and thereby "not substitute our judgment for that of the Immigration Judge" *Matter of A-S-*, *supra*, at 5, the Board nevertheless is obliged to look behind the Judge's determination to assess whether his or her stated reasons "are valid grounds upon which to base a finding that the applicant is not credible." *Aguilera-Cota v. INS*, *supra*, at 1381. Deference does not mean simply accepting as valid, any grounds upon which an Immigration Judge has based his or her conclusion.

B. Factors bearing on the determination of the respondent's credibility

In the case before us, the majority bases its adverse credibility finding on three factors:

(1) the admission of a fraudulent notarial birth certificate;

(2) the submission of two distinct asylum applications; and

(3) a general finding of inconsistency and vagueness.

The Immigration Judge also pointed to specific inconsistencies of record. A thorough review of the record establishes that none of these factors constitute cogent reasons for concluding that the respondent did not present a reliable claim.

1. The notarial birth certificate

According to the evidence in the record, the Immigration and Naturalization Service's Forensic Laboratory concluded that the notarial birth certificate relating to the respondent, which contains his photograph, may be counterfeit. As translated, the certificate states that the respondent was born on March 5, 1979 and contains the names of his parents.

It appears that the identical document, with the same photograph, and the same birth and familial information, was submitted by the Service to the Forensic Laboratory on two occasions within a three month period in 1995. In each assessment of the identical documents, the Forensics Laboratory concluded that the document was not authentic for different reasons –

once because it was printed on genuine paper stock and once because the watermark appeared to be chemically produced. (Exh. 10, 11, referring to forensics reports issued on July 13, 1995 and May 30, 1995 respectively).

The "remarks" section of each request for a forensics evaluation of this same document indicates that the analysis was requested for purposes of determining whether the respondent was an adult or a juvenile for custody (detention) purposes. The forensics report did not render an opinion regarding whether or not the respondent was an adult or a juvenile; however, it is worth noting that the document was submitted in 1995, when an individual born in 1979 would have been 25 or 26 years of age [*sic*].

In *Matter of O-D-*, *supra*, we held that the presentation of a counterfeit document that goes to issues at the heart of a claim, creates serious doubts regarding the respondent's overall credibility. *See also United States v. Williams*, 986 F.2d 86, 89 (4th Cir.) ("(The defendant's) possession and use of false identification to cash stolen checks certainly are probative of his truthfulness and credibility as a witness . . . ."), cert. denied, 509 U.S. 911 (1993). Although I recognize that the presentation of fraudulent documents can be a critical factor in an analysis of the respondent's claim, the birth certificate at issue is not the type of document upon which we should base a credibility finding with respect to the claim raised by the respondent.

First, it appears that the document was evaluated in 1995, in connection with the respondent's custody status. Although the respondent acknowledged that he provided such a document in support of his asylum claim, he indicated that he was unaware it had been found to be fraudulent. Tr. at 65-73. It is unclear

whether the respondent submitted the document previously to prove any essential aspect of his prior asylum claim, such as his relationship to his father in conjunction with his claimed risk of persecution for pro-democracy activities. The record is clear, however, that the only purpose served by submission of the notarial birth certificate in the instant case is to establish the respondent's identity and birth date.

In *Matter of O-D-, supra,* an applicant based his asylum claim on beatings he suffered because of his race or ethnicity, during a detention by officials in his native land of Mauritania. The applicant submitted fraudulent identity documents and we denied his application because he failed to present credible evidence. It must be recognized that the respondent's identity was a critical issue in *Matter of O-D-, supra,* because the respondent alleged persecution on account of his being a "black" Mauritanian.

However, in the instant case, the respondent requests asylum because of the coercive family planning policies in China and his refusal to follow government policies. The respondent's identity as a citizen of China is not been challenged and is not in issue. There is no issue regarding the identity, ethnicity, or nationality of the respondent. Therefore, unlike the documents in *Matter of O-D-, supra,* the 1995 notarial birth certificate do not provide a cogent basis for an adverse credibility finding because it does not reach the "heart of the matter." This document is only incidental to the respondent's claim. *See Akinkade v. INS,* No. 97-7122, 1999 WL 1000409 (9th Cir. November 5, 1999) (holding that fraudulent documents do not give rise to a per se adverse credibility finding). In fact, the Ninth Circuit has consistently held that isolated, minor, irrelevant

inconsistencies do not constitute adequate grounds for an adverse credibility finding. *See Ceballos-Castillo v. INS, supra*; *Aguilera-Cota v. INS, supra*, at 1381.

In addition, the respondent obtained these 1995 documents from relatives whom he believed had completed the appropriate applications (Tr. at 73). If the respondent's relatives provided erroneous information to officials, or the officials issued the documents on other than the officially recognized papers, the accuracy of the documents could have been affected through no fault of the respondent. Moreover, these relatives may not have carefully proofread the documents before sending them to the respondent. As we indicated in *Matter of O-D-, supra*, at 1083,

> [t]he adjudicator may consider whether that document points to a respondent's lack of credibility regarding the asylum claim. Ordinarily, it is reasonable to infer that a respondent with a legitimate claim does not usually find it necessary to invent or fabricate documents in order to establish asylum eligibility. On the other hand, there may be reasons, fully consistent with the claim of asylum, that will cause a person to possess false documents . . . .

The record indicates that the respondent explained he could not be sure about the document's counterfeit nature because his relatives were responsible for them. However, neither the Immigration Judge nor the majority address the respondent's explanation. Likewise, they do not provide any basis for concluding that the documents go to the heart or merits of the respondent's claim.

This is contrary to the analysis that is required under due process of law before an allegedly false statement

may be used to discredit a witness. *See United States v. Strother*, 49 F.2d 869 (2d Cir. 1995) (ruling that the fact finder must consider a false statements in light of all of the other evidence in the case in determining guilt or innocence). Moreover, by not considering the respondent's explanation, the Immigration Judge and the majority ignore well-established precedent that testimonial evidence may be the most important and dispositive part of any asylum claim. *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987).

I must also point out that the Service did not offer any testimony from its forensics expert. The respondent was not given a reasonable opportunity to cross-examine the individual who produced the forensics report found by the Immigration Judge and the majority to be so critical. Under these circumstances, I must reject the majority's conclusion that an allegedly fradulent document is fatal to this respondent's asylum claim. Any bright-line test to the contrary defeats the purpose of case-by-case adjudication that has been repeatedly endorsed by the Supreme Court. *Cf. INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *see also Aguirre-Aguirre v. INS*, 119 S. Ct. 1349 (1999).

2. The two applications

The respondent submitted two asylum applications. He filed the first application in 1995, in which he indicated that he fled China because of his pro-democracy activities. He filed the second application after having returned to China, where he was jailed and beaten over a period of one month. He then fled once again to the United States because family planning officials were searching for him.

In *Osorio v. INS*, 99 F.3d 928, 930 (9th Cir. 1996), the Ninth Circuit Court of Appeals considered a situation where an applicant submitted two separate applications for asylum. The *Osorio* court reasoned that there may be many reasons why two independent asylum applications result in providing what appears to be inconsistent information. Such reasons include the fact that "[f]orms are frequently filled out by poor, illiterate people who do not speak English and are unable to retain counsel." *Aguilera-Cota v. INS*, 914 F.2d 1375, 1382 (9th Cir. 1990); *see also Hartooni v. INS*, 21 F.3d 336, 342 n.1 (9th Cir. 1994). The Immigration Judge and this Board must consider all plausible and reasonable explanations for any inconsistencies in the applications. *See Osorio v. INS*, *supra*, at 932. Moreover, two different asylum applications filed by the same individual, which are complimentary [*sic*], rather than inconsistent, do not constitute evidence of discrepancies, and cannot support an adverse credibility finding.

The respondent explained that when he arrived in the United States in 1995, his attorney instructed him to apply for asylum based on his political activities because his chances of success were greater than applying for relief based on coercive population control policies (Tr. at 90). As the majority admits in its discussing regarding the "frivolous" nature of the respondent's application, such an explanation appears more than reasonable in light of our precedent in 1995. *See Matter of Chang*, 20 I&N Dec. 38 (BIA 1989) (overruled by section 601 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of P.L. No. 104-208, 110 Stat. 3009-546, 3009-586).

More importantly, neither the Immigration Judge nor the majority point to any specific discrepancies on which they base their finding that the two applications are inconsistent. *See Hartooni v. INS*, *supra*, at 342. (Board must provide specific, cogent reason[s] for any stated disbelief.) The majority does note that the respondent marked "single" on his 1995 asylum application, even though during his 1998 [*sic*] hearing, he indicated that he in fact was married when he initially entered the United States. The respondent, however, has explained this minor discrepancy in that he did not register his marriage right away (Tr. at 45) because of his age at the time that he married. Accordingly, he may have been confused about what to indicate regarding his marital status.

C. The current application

The Immigration Judge and the majority also point to certain facts which they believe constitute specific discrepancies relating to the respondent's current asylum application. I find do not find [*sic*] sufficient evidence to conclude that the points cited by the Immigration Judge actually reflect inconsistencies. *Cf. Matter of A-S-*, *supra*.

The Immigration Judge indicated, in his oral decision, that the respondent provided inconsistent answers regarding the current residence of his son and wife (I.J. at 7). However, the Immigration Judge has presented an incomplete picture of what the respondent actually stated. The record indicates that the following dialogue actually occurred:

Attorney: Okay. And where is he [your son] right now?

Respondent: At my father's home.

Attorney: Okay. Is he with your wife?
Respondent: Yes.
Attorney: Okay. Where is your wife?
Respondent: My wife is staying with her side of relatives.
Attorney: Do you know if your wife and your son are together?
Respondent: Yes.

(Tr. at 44).

The respondent's testimony suggests that he initially stated that his son resides with his paternal grandfather, while stating that his wife lives with her family. However, he indicated in the very next breath that his wife and son live together. The respondent subsequently explained that although he does not know where is wife is currently residing, she does have contact with her in-laws (Tr. at 80).

The flow of the respondent's answers do not suggest subterfuge. They were definite and specific, not hesitant or vague. Rather, it appears that some type of confusion occurred with respect to the interpretation or the respondent's understanding of the questions posed. Moreover, these discrepancies may be explained in terms of what the respondent understood the term "right now" and "together" to mean. Therefore, a reasonable explanation for this facial discrepancy is that it probably resulted more from miscommunication than from a lack of veracity. If the Immigration Judge intended to rely on this exchange as a basis for his credibility finding, it certainly would have been advisable for him to have clarified the record. *See Matter of S-M-J-*, Interim Decision 3303, (BIA 1998). As it is,

there is no basis to believe the respondent provided inconsistent testimony.

The Immigration Judge also took issue with the respondent's explanation of what happened to him when he returned to China in June of 1996. The respondent testified that "a basic worker" or "people who are like military people" subjected him to a severe beating (Tr. at 55). The respondent later stated that a police officer beat him at the detention center (Tr. at 88). The descriptions of the assailant do not necessarily appear to be inconsistent. The respondent described an individual of official capacity who had the authority to detain him apprehended him upon his arrival in China and then beat him. The Immigration Judge speculated that the respondent described different people when he simply provided more detailed information about his persecutor when asked. There is no basis in the record to support the Immigration Judge's finding that the respondent was referring to two different individuals, and accordingly, this aspect of the Immigration Judge's adverse credibility finding does not appear in the record. *Cf. Matter of A-S-, supra. See also Lopez-Reyes v. INS, supra,* at 911; *Mosa v. Rogers, supra*[] (rejecting an Immigration Judge's conclusion that the respondent was lying because the rebels let him go rather than killing him).

The final inconsistency noted by the Immigration Judge concerns where the respondent stayed after escaping from the hospital. The record does not include any evidence of such a discrepancy. *Cf. Matter of A-S-, supra.* The respondent testified that he stayed with his mother's relatives at a cousin's home for the first month (Tr. at 60). Again, the Immigration Judge failed to read carefully the respondent's asylum application when he

cited that it indicates that the respondent stayed at an aunt's home for 1 week (Exh. 2). In fact, the application provides that an aunt provided housing for 1 week and then the respondent lived with an uncle for 2 weeks. It is reasonable to presume that the respondent's cousin is probably related to his aunt and uncle with whom he lived for 3 weeks. In addition, a discrepancy between 3 weeks and 1 month is a minor discrepancy not worthy of an adverse credibility determination. *See Turcios v. INS, supra.* Accordingly, I find no basis for [*sic*] to rely on this alleged discrepancy as a basis for the Immigration Judge's adverse credibility finding.

In sum, I find that the respondent testified credibly. The majority and the Immigration Judge have used simple "triggers" to arrive [*sic*] an unjustified adverse credibility finding. The findings of the majority and the Immigration Judge are not cogent, and they do not present a "legitimate articulable basis" on which to disbelieve the respondent's claim. *Chang v. INS, supra.*

III. MERITS OF THE RESPONDENT'S ASYLUM APPLICATION AND HIS CLAIM UNDER THE CONVENTION AGAINST TORTURE

A. Past persecution

The Ninth Circuit holds that absent an explicit finding that a particular statement is not credible, an applicant's testimony should be accepted as true. *See, e.g., Chang v. INS, supra,* at 1067; *Prasad v. INS,* 101 F.3d 614 (9th Cir. 1996); *Hartooni v. INS, supra,* at 342. *See also Matter of B-,* Interim Decision 3251 (BIA 1995). The objections raised by the Immigration Judge do not discredit the fact that upon returning to China, authorities physically beat the respondent with their hands to such an extent that he has permanent scarring

(Tr. at 57). Authorities thereafter constantly searched for the respondent.

Based on the respondent's credible testimony, I find that he has established mistreatment that rises to the level of persecution required for asylum under the Act. *See Prasad v. INS*, 83 F.3d 315, 318 (9th Cir. 1996) (alien jailed twice, once for five days and another time for two days). *Singh v. Ilchert*, 63 F.3d 1501 (9th Cir. 1995) (finding persecution where Indian security forces detained, tortured, and interrogated alien for 10 days); *Desir v. Ilchert*, 840 F.3d 723 (9th Cir. 1988) (past persecution found where alien was arrested three times, severely beaten on occasion, and directly fired upon). Furthermore, the respondent explained that he escaped as quickly as he could and departed for the United States. *Cf. Matter of D-M- and A-M-*, 20 I&N Dec. 409 (BIA 1991) (holding that a Cuban asylum applicant's voluntary continued residence in Cuba for several years after his arrest and detention demonstrated little likelihood of future persecution).

B. Well-founded fear of persecution

The record includes Congressional testimony that China has created a network of "paid informants" who report unauthorized pregnancies to authorities. In addition, sterilization is also employed as punishment when an individual commits some type of infraction. Finally, the report indicates that family planning centers resemble detention centers with actual cells and prison bars (Exh. 8). Thus, if the respondent is forced to return to China he is likely to face severe punishment including possible physical beatings, sterilization, or prolonged detention because he defied birth control policy.

The Service has not effectively rebutted the applicable presumption of a well-founded fear of persecution. An alien who had demonstrated past persecution need not demonstrate compelling reasons for being unwilling to return to his or her country of nationality or last habitual residence in order to be granted asylum. *See* 8 C.F.R. § 208.13(b)(1)(ii). Rather, he or she is considered to have established eligibility for asylum both on account of the past persecution which has been demonstrated and the well-founded fear of future persecution which is presumed. *Matter of H-*, 21 I&N Dec. 337 (BIA 1996). In addition, for compelling reasons arising out of the severity of past persecution, an applicant may be afforded asylum even where the evidence establishes such a change in conditions that he or she may be found to no longer have a well-founded fear of persecution. 8 C.F.R. § 208.13(1)(b)(ii); *Matter of B-*, *supra*; *Matter of Chen*, 20 I&N Dec. 16 (BIA 1989). Furthermore, the record does not suggest any significant adverse factor contravening a favorable exercise of discretion regarding his asylum application. *Matter of Pula*, 19 I&N Dec. 467 (1987).

C. Deferral of removal

The Convention Against Torture was signed by the United States on October 18, 1988, and the Senate adopted its resolution of advice and consent to ratification on October 27, 1990.[1] The treaty became effectively binding on the United States on November 20, 1994.[2] Article 3 of the Convention provides:

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[1] 136 Cong. Rec. S17,486, S17, 492 (daily ed. Oct. 27, 1990).

[2] One month earlier, the President deposited the instrument of ratification with the Secretary-General of the United Nations. *See* 74 Interpreter Releases, No. 45, Nov. 21, 1997, at 1773, 1781 (citing

> 1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
>
> 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

The Board previously ruled that we lacked the authority to entertain a request for protection under the Convention Against Torture. *See Matter of H-M-V-*, Interim Decision 3365 (BIA 1998). However, on October 21, 1998, the President signed into law legislation which requires that "[n]ot later than 120 days after the date of enactment of this Act, the heads of the appropriate agencies shall prescribe regulations to implement the obligations of the United States under Article 3 of the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention." Section 2242(b) of the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, Division G, 112 Stat. 2681 (Oct. 21, 1998). Obligations under the Convention Against Torture have been in effect for the United States since November 20, 1994. Convention Against Torture and Other Forms of Cruel, Inhuman or De-

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U.N. Doc. No. 571 Leg/SER.E/13, IV.9 (1992); Torture Convention, *supra*, Art. 27(2)).

grading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984).

On February 19, 1999, interim regulations implementing the Convention Against Torture were published in the Federal Register, effective March 22, 1999. *See* 64 Fed. Reg. 8478-96 (Feb. 19, 1999) (to be codified at 8 C.F.R. pt. 3 *et seq.*). The interim regulations establish procedures for raising a claim for protection under Article 3 of the Convention Against Torture, which prohibits refoulement of an alien to a country where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. *See* 64 Fed. Reg. 8478; Convention Against Torture, Art. 3.

The burden of proof is on the applicant for withholding of removal under section 241(b)(3) of the Act to establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal. 8 C.F.R. § 208.16(b) (1999). The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration. In assessing whether it is more likely than not that an applicant would be tortured in the proposed country of removal, all evidence relevant to the possibility of future torture shall be considered, including, but not limited to:

(i) Evidence of past torture inflicted upon the applicant;

(ii) Evidence that the applicant could relocate to a part of the country removal [*sic*] where he or she is not likely to be tortured;

(iii) Evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and

(iv) Other relevant information regarding conditions in the country of removal. 8 C.F.R. § 208.16(c)(3).

The regulations provide that torture is any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. 8 C.F.R. § 208.18(a)(1).

Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture. 8 C.F.R. § 208.18(a)(2). Torture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. 8 C.F.R. § 208.18(a)(3). Lawful sanctions include judicially imposed sanctions and other enforcement actions authorized by law, including the death penalty, but do not include sanctions that defeat the object and purpose of the Convention Against Torture to prohibit torture.

China has a long record of serious human rights violations. The record reflects that family planning officials began searching for the respondent when returned

to China in 1996. The respondent testified that upon his return to China in 1996, he experienced such an atrocious beating by the authorities, that he spent over 1 month in a hospital. 8 C.F.R. § 208.18(a)(2).

Prior to his return he was sought by Chinese officials for participating in pro-democracy activities and for having violated the family planning laws. It is clear that this mistreatment was intentional. 8 C.F.R. § 208.18(a)(5). The respondent further indicated that medical personnel only occasionally treated him for the severe injuries to his face and head which required significant suturing. In fact, they prevented him from interacting with his wife and son. It is clear that the respondent's beating and mistreatment while hospitalized was extreme. 8 C.F.R. § 208.18(a)(2). It also is clear that the respondent's mistreatment was directed against the respondent [*sic*] did not constitute merely "lawful sanctions," 8 C.F.R. § 208.18(a)(3), and that his mistreatment occurred while he was in the control of the Chinese government. 8 C.F.R. § 208.18(a)(6); 8 C.F.R. 18(a)(7).

Past torture or mistreatment, while not conclusive, constitutes a basis on which an applicant may establish the probability of future torture if returned to his country. Consequently, it is more likely than not that Chinese officials will torture the respondent with severe beatings or sterilization should he return to China. Therefore, this removal should be deferred under the Convention Against Torture.

V. Conclusion

Based on the foregoing, I find that the Immigration Judge's credibility finding is not supported by the record. The respondent's testimony establishes that he

has a well-founded fear of persecution and that it is more likely than not that his life and freedom will be endangered should he be forcibly returned to China. In addition, the record contains corroborating evidence specifically supporting the events disclosed by the respondent. In this case, the past persecution established by the respondent also raises the presumption that his life and freedom would be threatened were he to be forcibly returned. Accordingly, the respondent has sustained the applicable burden of proof and should be granted asylum and withholding of removal, because he has suffered past persecution and the record supports the conclusion that he continues to have an unrebutted fear of persecution and that persecution is more likely than not.

In addition, the record establishes the probability that the respondent will face torture if he returns to China and is therefore also eligible for relief under the Convention Against Torture. The decision of the Immigration Judge and the majority can not be supported on the record before us. I must therefore dissent.

/s/ LORY DIANA ROSENBERG
LORY DIANA ROSENBERG
Board Member

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
FLORENCE, ARIZONA

File No. A 77 234 212

IN THE MATTER OF
CHEN YI CHUAN, RESPONDENT

June 7, 1999

IN REMOVAL PROCEEDINGS

CHARGE: Section 212(a)(70(A)(i)(I), I&N Act - no valid entry documents

APPLICATIONS: Section 208(a), I&N Act - asylum; Section 241(b)(3), I&N Act - withholding of removal; and relief under the Torture Convention

ON BEHALF OF RESPONDENT: Melissa Jacobs, Esquire

ON BEHALF OF SERVICE: Monika Sud-Devaraj, Esquire

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent in this case is a 24-year-old male, native and citizen of China, who was placed in removal

proceedings by the issuance of a Notice to Appear on January 29, 1999 (*see* Exhibit 1).

At a Master Calendar hearing on March 1, 1999 the respondent, through counsel, admitted the factual allegations on the Notice to Appear and conceded the charge of removal. The respondent declined to designate a country of removal and the Court designated China, the country of his birth and citizenship.

The respondent requested an opportunity to apply for asylum and withholding of removal, and such application was submitted to the Court (*see* Exhibit 2).

This Court finds by clear, convincing and unequivocal evidence that the charge of removal has been sustained. The sole issue before the Court today concerns the respondent's applications for relief from removal.

The respondent testified that he was born in China on March 5, 1975 and that he is 24 years old. He stated that his parents were still alive and living in China. He graduated from elementary school in 1989, and then worked on the family farm.

He testified that he married his wife on October 5, 1994, when he was 20 years old. He stated that his marriage was a local traditional marriage, without government permission. He stated that his wife is Jiang Ai Ming, and that they married in his hometown in his home. His wife is now 24 years old and lives with relatives in China. He stated that his son is now four years old and is at his father's home.

The respondent stated that he left China in 1955 [*sic*] because he was afraid that family planning officials

would catch him. His wife became pregnant in February 1995, and the authorities attempted to arrest him at that time. They also came looking for him at his home in February 1995. He stated that he stayed with his aunt for one week and then went home. He stated that the family planning officials were in his home and he ran away from them and they did not catch him. His parents told him to stay away from his home. An aunt helped him make arrangements to leave China in March of 1995. He stated that his wife did not react strongly and did not say much when he told her that he would be leaving and coming to the United States.

In the United States the respondent applied for political asylum, which was denied by an Immigration Judge, and he was ordered deported to China. He stated that he went to California and eight months after the order he was deported to China. He arrived in Shanghai in June of 1996. The respondent stated that the police put him in custody and beat him up. He said it was not a police officer who beat him up, but a worker in the detention facility. He stated that he was hit in the face and the body and that the individual who beat him up used his hands. The respondent stated that he then went to the hospital where he stayed for one month. He then escaped from the hospital which was in the detention center, and went to a train station where he begged for money and then called home. He stated that his uncle then came to help him. He then stayed one month with a cousin. Relatives gave him money to rent a place to live in the countryside of the Fuzhou Province, and he worked to earn money. This city was 60 to 70 kilometers from where his hometown was. He stayed there two weeks and them [*sic*] moved again. He stated that the family planning officials were

looking for him at his house and so he moved around to different places for two years. He stated that he saw his family in 1997, to include his wife, son, and mother. He stated that he spent 15 minutes with them and then returned back to Fuzhou City.

The respondent testified that in July 1998 he left China again, and this time a cousin helped him make the arrangements. He stated that he has uncles in the United States in New York.

The respondent testified that he does not know what would happen to him if he was sent back to China, but he feels that China has no human rights and he is afraid because he illegally married and he escaped from the detention hospital.

On cross-examination the respondent testified that when he first came to the United States, his asylum application was based on political activity. He was shown copies of his notarial birth certificates dated 1995 (*see* Exhibits 10 and 11). He stated that he did not know that they were counterfeit or unauthorized.

The respondent stated that he last talked to his wife in January 1999. The respondent stated that when they were married he was too young for his marriage to be legally authorized, but that his parents and her parents consented to the marriage.

He stated that the same day that his wife found out she was pregnant the family planning officials tried to arrest him and his wife, and they escaped because their parents interfered with the family planning officials.

The respondent testified that the first time he came to the United States he paid the smugglers $2,000 and was supposed to pay the remaining $30,000 when he arrived in the United States, but since he was caught by Immigration he did not have to pay the rest of the money. At his first asylum hearing in 1995, the respondent did not mention anything about family planning problems.

The respondent testified that he was beaten by a policeman and not a basic worker in the detention facility.

The respondent testified that he only saw his wife and child from a distance, that he did not get to visit with them.

The respondent testified that the second time he came to the United States he was supposed to pay a smuggler somewhere over $40,000.

On re-direct examination the respondent stated that he did not mention anything about the family planning in his first asylum application because his attorney told him that his chances were better with the political theme. In the second asylum application he stated that he did not bring up the political claim because he did not want to mention the past.

The respondent stated that the birth dates on Exhibits 10 and 11 are wrong, but he does not know why. He thought that maybe his relatives made a mistake when applying for his birth certificate.

The respondent testified that his son is staying with the respondent's wife and that he is not with the respondent's father.

In order to establish eligibility for asylum, the respondent must show that he is unable or unwilling to return to his native country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The Board of Immigration Appeals has adopted a reasonableness standard to determine if fear of persecution is well-founded.

The burden of proof is upon the applicant for asylum to establish that he is a refugee as defined by the Act.

An application for asylum is contemporaneously viewed as an application for withholding of removal. In order to establish eligibility for withholding of removal, the respondent must show that his life or freedom would be threatened in his country on account of race, religion, nationality, membership in a particular social group, or political opinion. This statutory provision requires that the respondent demonstrate a clear probability of persecution on one of the five grounds enumerated in the Act. The respondent must demonstrate that it is more likely than not that he would be subject to persecution if returned to his native land. This is a more stringent standard than that required to establish eligibility for asylum.

Findings of the Court

This Court finds that the respondent is not a credible witness. There are several discrepancies between the written application for asylum, the application he

submitted in 1995, and his testimony in Court today. On several occasions, in fact, the respondent changed his story while testifying orally today.

First the respondent said that his son was staying at his father's home and that his wife was with her relatives. On redirect the respondent stated that his wife and son were staying together and that his son was not at his father's home. The respondent first stated that the police put him in custody in Shanghai and that he was beaten, but not by a police officer, only by one of the workers at the detention facility. Later in his testimony he stated that it was a police officer who beat him. In his testimony the respondent stated that after he was released from the hospital he stayed with a cousin for a month. In his written application he stated that he stayed with a cousin for a week.

Further, the respondent submitted an asylum application in 1995 which was totally based upon his political activities in China, and his current application said nothing of any political activity. In fact, he checked boxes which said that he had no affiliation with any political groups or organizations. His current application for asylum, therefore, mentions nothing about any political activity and it is all based upon family planning, which is not mentioned at all in his 1995 application. Further, the respondent in a sworn statement (*see* Exhibit 5) mentioned that his fear in returning to China would be that he would have to pay a fine and he mentions nothing about family planning issues, nor does he mention anything about political activities, only that he would be punished for leaving China by having to pay a fine.

Further, it appears that the respondent submitted in his 1995 hearing two notarial birth certificates that were found to be unauthorized, or counterfeit, which contained a different date of birth.

It appears to this Court that the respondent has told so many different stories that it is difficult for him to keep them straight and, therefore, this Court will make an adverse finding regarding the respondent's credibility as an applicant and as a witness.

Even if the respondent were to be believed in his testimony and his application before the Court, the Court will not find that he has been persecuted on account of any of the five grounds in the Act. If the respondent is to be believed the family planning authorities, he says, tried to apprehend him while they may have just wanted to ask questions. He was not stopped by them or detained by them. He was able to get away. And while they did look for him, he was able to always avoid being confronted by them. Also, from the *State Department Reports* within the file, it appears that the policy at this time does not include forced abortions for those who have an unauthorized marriage and then have a child.

Further, the respondent has failed to establish that he would face persecution if returned to China at this time. When he returned before he apparently was placed in some type of holding facility at the airport, possibly to check out his identification and his story, and some low type basic worker beat him up. There is no explanation as to why he was beat up by this basic worker, but he then was placed in a hospital and stayed for a month and then says that he escaped from that hospital or got away from that hospital and then was on

the run, apparently, and in hiding. There is no indication from the evidence, or the credible evidence, that they have interest in him because of either his political activity or his family practices. So even if this Court were to give his testimony some credence, the Court would not find that he has made a case for asylum. And since he has not met the burden for asylum, the Court will find that he has not met the burden which is a heightened burden for withholding of removal.

Further, this Court finds that this respondent has certainly not met the burden to show that he deserves relief under the Torture Conventions. The respondent has not shown that it is more likely than not that he would be tortured if returned to China at this time.

The Court would further make a finding that the respondent has submitted a frivolous application for asylum to this Court. It appears that the respondent has fabricated his story before this Court to attempt to get asylum in the United States. The warning was given regarding a frivolous asylum application. The Court will find that his asylum application is frivolous and, therefore, will bar him from any relief ever under the Immigration and Nationality Act.

ORDER

IT IS HEREBY ORDERED that the respondent's application for asylum be denied.

IT IS FURTHER ORDERED that the respondent's application for withholding of removal be denied.

IT IS FURTHER ORDERED that the respondent's application for relief under the Torture Convention be denied.

IT IS FURTHER ORDERED that the respondent be barred from any relief under the Immigration and Nationality Act because of his frivolous application for asylum.

IT IS FURTHER ORDERED that the respondent be removed from the United States to China for the charge on the Notice to Appear.

/s/ SCOTT M. JEFFERIES
SCOTT M. JEFFERIES
Immigration Judge

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-70478
I&NS No. A77-234-212

YI QUAN CHEN, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT

[Filed: Mar. 11, 2002]

ORDER

Before: LAY,[1] TROTT and BERZON, Circuit Judges.

The panel has voted unanimously to deny respondent's petition for rehearing and to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are DENIED.

---

[1] The Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

APPENDIX E

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Section 1101 of Title 8 of the United States Code provides in pertinent part as follows:

§ 1101. Definitions

(a) As used in this chapter—

* * * * *

(42) The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. For pur-

poses of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

* * * * *

2. Section 1158 of Title 8 of the United States Code provides in pertinent part as follows:

§ 1158. Asylum

(a) Authority to apply for asylum

(1) In general

Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section * * *.

* * * * *

(b) Conditions for granting asylum

(1) In general

The Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Attorney General under this section if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

* * * * *

(d) Asylum procedure

(1) Applications

The Attorney General shall establish a procedure for the consideration of asylum applications filed under subsection (a) of this section. The Attorney General may require applicants to submit fingerprints and a photograph at such time and in such manner to be determined by regulation by the Attorney General.

* * * * *

3. Section 1231 of Title 8 of the United States Code provides in pertinent part as follows:

§ 1231. Detention and removal of aliens ordered removed

* * * * *

(b)Countries to which aliens may be removed

(3) Restriction on removal to a country where alien's life or freedom would be threatened

(A) In general

[T]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

* * * * *

4. Section 1252 of Title 8 of the United States Code provides in pertinent part as follows:

§ 1252. Judicial review of orders of removal

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

(b) Requirements for review of orders removal

With respect to review of an order of removal under section (a)(1) of this section, the following requirements apply:

* * * * *

(4) Scope and standard for review

Except as provided in paragraph (5)(B)—

(A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,

(B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,

(C) a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law, and

(D) the Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

* * * * *

5. Section 208.13 of Title 8 of the Code of Federal Regulations provides as follows:

§ 208.13 Establishing asylum eligibility

(a) *Burden of proof.* The burden of proof is on the applicant for asylum to establish that he or she is a refugee as defined in section 101(a)(42) of the Act. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration. The fact that the applicant previously established a credible fear of persecution for purposes of section 235(b)(1)(B) of the Act does not relieve the alien of the additional burden of establishing eligibility for asylum.

(b) *Eligibility.* The applicant may qualify as a refugee either because he or she has suffered past persecution or because he or she has a well-founded fear of future persecution.

(1) *Past persecution.* An applicant shall be found to be a refugee on the basis of past persecution if the applicant can establish that he or she has suffered persecution in the past in the applicant's country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion, and is unable or unwilling to return to, or avail himself or herself of the protection of, that country owing to such persecution. An applicant who has been found to have established such past persecution shall also be presumed to have a well-founded fear of persecution on the basis of the original claim. That presumption may be rebutted if an asylum officer or immigration judge makes one of the findings described in paragraph (b)(1)(i) of this section. If the applicant's

fear of future persecution is unrelated to the past persecution, the applicant bears the burden of establishing that the fear is well-founded.

(i) *Discretionary referral or denial.* Except as provided in paragraph (b)(1)(iii) of this section, an asylum officer shall, in the exercise of his or her discretion, refer or deny, or an immigration judge, in the exercise of his or her discretion, shall deny the asylum application of an alien found to be a refugee on the basis of past persecution if any of the following is found by a preponderance of the evidence:

(A) There has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in the applicant's country of nationality or, if stateless, in the applicant's country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion; or

(B) The applicant could avoid future persecution by relocating to another part of the applicant's country of nationality or, if stateless, another part of the applicant's country of last habitual residence, and under all the circumstances, it would be reasonable to expect the applicant to do so.

(ii) *Burden of proof.* In cases in which an applicant has demonstrated past persecution under paragraph (b)(1) of this section, the Service shall bear the burden of establishing by a preponderance of the evidence the requirements of paragraphs (b)(1)(i)(A) or (B) of this section.

* * * * *

§ 208.16 Withholding of removal under section 241(b)(3)(B) of the Act and withholding of removal under the Convention Against Torture.

* * * * *

(b) *Eligibility for withholding of removal under section 241(b)(3) of the Act; burden of proof.* The burden of proof is on the applicant for withholding of removal under section 241(b)(3) of the Act to establish that his or her life or freedom would be threatened in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration. The evidence shall be evaluated as follows:

(1) *Past threat to life or freedom.* (i) If the applicant is determined to have suffered past persecution in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion, it shall be presumed that the applicant's life or freedom would be threatened in the future in the country of removal on the basis of the original claim. This presumption may be rebutted if an asylum officer or immigration judge finds by a preponderance of the evidence:

(A) There has been a fundamental change in circumstances such that the applicant's life or freedom would not be threatened on account of any of the five grounds mentioned in this paragraph upon the applicant's removal to that country; or

(B) The applicant could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so.

(ii) In cases in which the applicant has established past persecution, the Service shall bear the burden of establishing by a preponderance of the evidence the requirements of paragraphs (b)(1)(i)(A) or (b)(1)(i)(B) of this section.

(iii) If the applicant's fear of future threat to life or freedom is unrelated to the past persecution, the applicant bears the burden of establishing that it is more likely than not that he or she would suffer such harm.

* * * * *

No. 02-25

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In The
Supreme Court of the United States

IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

v.

YI QUAN CHEN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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RESPONDENT'S COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the court of appeals relied upon and applied the proper scope and standard of judicial review when it overturned a determination by the Board of Immigration Appeals (BIA) that respondent did not testify credibly when seeking asylum and withholding of removal from the United States.

2. Whether the court of appeals erred when, after reversing the BIA's determination that respondent was not credible, the court, based on the administrative record as a whole, found that respondent was eligible for asylum and entitled to withholding of removal from the United States, rather than remanding the case to the BIA.

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RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

Respondent Yi Quan Chen ("Chen") respectfully opposes the government's petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

In addition to the provisions cited and reproduced by the government, this case involves 8 C.F.R. 208.13(b)(2) and (3) and 8 C.F.R. 208.16(b)(2) and (3), 208.16(c), 208.16(d) and 208.18, which are reproduced *infra* in Respondent's Appendix ("Resp. App.").

RESPONDENT'S COUNTERSTATEMENT OF LAW

Respondent agrees with the government's statement of the relevant statutory and regulatory framework of this case, except for its omission of 8 U.S.C. 1101(a)(42)(B), which amended the Immigration and Nationality Act to include as a ground for asylum the "resistance to a coercive population control program," and is at the core of this case.[1]

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[1] In addition, 8 C.F.R. 208.16 and 208.18 are relevant because, in the proceedings below, respondent also sought withholding of removal under the Convention Against Torture. The agency rejected this claim, and the court of appeals, in granting withholding of removal, did not specifically invoke the Convention Against Torture. Accordingly, respondent seeks to preserve this issue in the event that this Court decides to remand the case.

RESPONDENT'S COUNTERSTATEMENT OF FACTS

Chen, a citizen of the People's Republic of China, grew up in a rural village in Fujian province. E.R. 79, 160. On October 5, 1994, Chen, then twenty years old, married Ai-Ling Jiang, then age nineteen. Their marriage was not legally recognized because the couple married younger than the law allowed. *Id.* 82, 85. Therefore, they could obtain neither a marriage permit, nor a birth-allowed permit. *Id.* 85-87. In China, when a woman becomes pregnant without such permits, her pregnancy violates the law. *Id.* 181-186. Chinese family planning officials frequently punish those who violate these policies by such methods as the use of physical force, detention, coerced abortion, sterilization, exorbitant fines, and property destruction. *Id.* 86, 178-186. Those who seek to evade punishment often go into hiding in China, or if they can, leave the country and seek refuge elsewhere. *Id.* 186-187. Chen's wife became pregnant in February 1995. Family planning officials attempted to detain the Chens because the couple did not have the requisite permits. Chen's parents intervened, allowing the Chens to flee. *Id.* 86. To elude the authorities, the couple stayed with different relatives. Family planning officials persisted in their pursuit, repeatedly visiting the home of Chen's parents searching for him. On one occasion, Chen returned home, and discovered family planning officials waiting for him. Chen then hid in his aunt's home. *Id.* 88-91.

In the spring of 1995, immigrant smugglers helped Chen flee to the United States where he was placed in INS detention. *Id.* 92-93, 126. While he was in the U.S., Mrs. Chen received a notice requiring her to submit to an abortion. *Id.* 220. She subsequently gave birth to their son. To evade family planning officials, Mrs. Chen and the child have continued to change residences often. *Id.* 102, 120-121. Chen's lawyer prepared an asylum application based on pro-democracy grounds, instructing him not to mention that Chinese authorities sought him for his violation of

China's marriage and family planning laws, because if he did so, he would "have less chance to win" his case. *Id.* 130. The IJ denied Chen's 1995 claim, and in 1996, INS deported him to China. *Id.* 93-94.

Chinese officials apprehended Chen at the Shanghai airport and placed him in a detention center. *Id* 127. They beat him so severely that he required hospitalization, and now bears a scar on his forehead. *Id.* 95-99, 129. Chen escaped after approximately one month in the detention center's hospital. He learned that the Chinese government had issued notification of his escape, and moved around a lot to avoid capture. When he called home, his family told him to stay away because family planning officials and the police were searching for him. *Id.* 99-102. Government agents ransacked the home of Chen's parents and detained them looking for Chen and his wife. *Id.* 200. During this time, Chen saw his wife and son from a distance once, for just a few minutes. He stayed away from them because he feared for their safety. *Id.* 103, 121.

Chen again fled to the U.S. in 1998. *Id.* 105. The INS detained him, holding him until he was granted withholding of removal in the fall of 2001. Resp. App. 17a. Chen filed for asylum and withholding of removal, including withholding under the Convention Against Torture. Pet. App. 57a. Evidently reassured by his new counsel that it was permissible to discuss his violations of China's marriage and family planning laws, Chen focused on those areas in his 1998 application. *See, e.g., id.* 130, 168. He submitted detailed country conditions evidence, admitted in the administrative record, which confirms that the Chinese government harshly punishes individuals who resist coercive family planning practices, including those who marry before the government-mandated age and disregard abortion requirements. *Id.* 181-187. Chen does not speak English, and testified at his asylum hearing through a translator via telephone. *Id.* 69, 71-72, 95-96. The IJ and BIA determined that Chen had not testified credibly, and denied relief. These decisions, and the court

of appeals' reversal will be discussed in the context of the arguments below.

ARGUMENT

I. THE COURT BELOW CORRECTLY RELIED UPON AND APPLIED WELL-ESTABLISHED RULES FOLLOWED BY OTHER CIRCUITS GOVERNING THE SCOPE AND STANDARD OF REVIEW WHEN IT REVERSED THE BIA'S ADVERSE CREDIBILITY DETERMINATION.

1. The court of appeals employed the proper legal standard in reviewing the BIA's conclusion that respondent's testimony was not credible. As the court correctly stated, factual findings of the BIA "will be upheld on review unless 'any reasonable adjudicator would be compelled to conclude to the contrary.'" Pet. App. 4a (quoting 8 U.S.C. 1252(b)(4)(B)). *Accord INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992). The court held that this standard, although deferential, requires that the BIA have a "legitimate articulable basis to question the [applicant's] credibility" and "a specific, cogent reason for any stated disbelief." Pet. App. 4a. Consequently, "minor discrepancies, inconsistencies, or omissions that do not go to the heart of an applicant's asylum claim" do not constitute substantial evidence. *Id.* Other courts of appeals also require that an adverse credibility determination by the BIA be supported by "substantial evidence" and "specific, cogent reasons" that "bear a legitimate nexus to the finding." *See, e.g., Gailius v. INS*, 147 F.3d 34, 44, 47 (1st Cir. 1998); *Balasubramanrim v. INS*, 143 F.3d 157, 162 (3d Cir. 1998); *Figeroa v. INS*, 886 F.2d 76, 78 (4th Cir. 1989); *Mansour v. INS,* 230 F.3d 902, 906 (7th Cir. 2000); *Hamzehi v. INS,* 64 F.3d 1240, 1242 (8th Cir. 1995). Similarly, other circuits hold that although the substantial evidence standard is deferential, deference "is not due" when the BIA's factual findings are based on "inferences or presumptions that are not reasonably grounded in the record, viewed as whole." *Cordero-Trejo v.*

INS, 40 F.3d 482, 487 (1st Cir. 1994). Adverse credibility determinations based on minor discrepancies, inconsistencies or omissions that do not go to the heart of an applicant's asylum claim cannot constitute substantial evidence. *See Bojorques-Villanueva v. INS*, 194 F.3d 14, 16 (1st Cir. 1999); *Senathirajah v. INS*, 157 F.3d 210, 221 (3d Cir. 1998). *See also Alvarado-Carillo v. INS*, 251 F.3d 44, 56 (2d Cir. 2001) (finding that a plausible explanation may suffice to overcome minor inconsistencies); *Asylum Officer Basic Training Workbook*, *"Credibility,"* (March 1999) at 12, 27 (minor discrepancies that do not directly bear on material aspects of an asylum claim cannot undermine an applicant's credibility). The Ninth Circuit has followed these standards for more than fifteen years, *see, e.g., Mosa v. Rogers*, 89 F.3d 601, 604 (9th Cir. 1996); *Hartooni v. INS*, 21 F.3d 336, 342 (9th Cir. 1994); *Damaize-Job v. INS*, 787 F.2d 1332, 1338 (9th Cir. 1986); and did so in the instant case.

In addition to crafting these standards, the courts of appeals not only shaped uniform rules for reviewing adverse credibility determinations in asylum claims, but also effectuated the humanitarian purpose of the Refugee Act of 1980, which governs asylum cases.[2] *See, e.g.*, 55 Fed. Reg. 30674, 30675 (July 27, 1990) (explaining that the Refugee Act reflects "a fundamental belief that the granting of asylum is inherently a humanitarian act distinct

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[2] Such an approach is also mindful of the unusual circumstances that an asylum applicant typically confronts, each of which was faced by respondent during the asylum process: fear and disorientation; detention; unfamiliarity with the language, culture, and legal system in the United States; absence of control over obtaining evidence; and the obligation to testify at his hearing through a non-court certified translator by telephone. *See* INS, *Asylum Officer Basic Training Workbook, "Credibility"* at 6-11; D. Anker, *Determining Asylum Claims in the United States: A Case Study on Implementation of Legal Norms in an Unstructured Adjudicatory Environment*, 19 N.Y.U. Rev. L. & Soc. Change 433 (1992/1993).

from the normal operation and administration of the immigration process"); *Report of the U.S. Senate Judiciary Committee*, S. Rep. No. 96-256, at 1 (1980) *reprinted in* U.S.C.C.A.N, 141 ("The Refugee Act gives statutory meaning to our national commitment to human rights and humanitarian concerns, not reflected in the Immigration and Nationality Act of 1952 as amended"); *Matter of Pula,* 19 I & N Dec. 467, 476 (BIA 1987) (Heilman, concurring) (stating that "asylum provisions are humanitarian in their essence and indeed recognize that the forces which impel persons to seek refuge may be so overwhelming that the 'normal' immigration laws cannot be applied in their usual manner."). As this Court recognized in *INS v. Cardoza-Fonseca,* 480 U.S. 421, 449 (1987), the Refugee Act is especially important because the "harsh measure" of deportation is "all the more replete with danger when the alien makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country."

2. While the court in *Chen* properly followed the rules adopted by other circuits for reviewing an adverse credibility determination in an asylum case, the government nevertheless cites four cases that it claims conflict with the decision, and with the Ninth Circuit's approach generally. *See* Pet. 20. These cases, however, demonstrate nothing of the sort.

In *Mansour v. INS*, 230 F.3d 902 (7th Cir. 2000), the court affirmed the BIA's adverse credibility determination based on "significant" discrepancies in the alien's application "which were central to the respondent's claim." *Id.* at 906. The Seventh Circuit applied precisely the same standard employed in this case: an adverse credibility determination will be upheld if supported by "specific, cogent reasons" (*id.; compare* Pet. App. 8a), including discrepancies that "go to the heart of" (Pet. App. 8a) or are "central to" (*Mansour*, 230 F.3d at 906) the applicant's asylum claim. The fact that the BIA's adverse credibility determination was upheld in *Mansour* and reversed in this

case does not demonstrate a "conflict with other courts of appeals" (Pet. 20) as to the appropriate standard of review.

As in the instant case, in *Bojorques-Villanueva v. INS*, 194 F.3d 14 (1st Cir. 1999), the court independently evaluated each ground the BIA cited as a basis for finding the applicant incredible. The court articulated a standard virtually identical to the one set forth by the Ninth Circuit in *Chen*, namely, that "an adverse credibility determination cannot rest on trivia but must be based on discrepancies that 'involved the heart of the asylum claim.'" *Id.* at 16 (quoting *De Leon-Barrios v. INS*, 116 F.3d 391, 393-94 (9th Cir. 1997)). Similarly, *Rucu-Roberti v. United States Department of Justice, INS*, 177 F.3d 669 (8th Cir. 1999), upheld the BIA's denial of eligibility for asylum and withholding of deportation on the grounds that the applicant "failed to present a consistent account of what allegedly had happened" and that the applicant's testimony was "not detailed, consistent, and believable." *Id.* at 670. While *Rucu-Roberti* contains no discussion of the standard for reviewing a BIA adverse credibility determination, it was decided on the same standard as the case at bar: whether discrepancies were central to the merits of the applicant's claim.

The government misperceives the Fifth Circuit's decision in *Chun v. INS*, 40 F.3d 76 (5th Cir. 1994). In *Chun*, the court declared that it "will not review decisions turning purely on the immigration judge's assessment of the alien petitioner's credibility." *Id.* at 78. The Fifth Circuit's perspective therefore differs from every other court of appeals to consider the issue because its deference to the BIA's credibility findings is not "substantial" but total. Such an approach violates the standard for reviewing factual findings enunciated by this Court in *Elias-Zacarias*, and codified by Congress in 8 U.S.C. 1252 (b)(4)(B). The instant case is not an appropriate vehicle to review the conflict between the Fifth Circuit and every other court of appeals over whether courts should *ever* overturn a BIA adverse credibility finding, since the

government's petition does not appear to defend the extreme position taken in *Chun*.

3. The government contends that the court of appeals erred in "treating each inconsistency or gap in Respondent's evidence as an isolated defect" and "failing to consider that evidentiary defects may carry cumulative significance" with respect to assessing an applicant's credibility. Pet. 18-20. This criticism is not justified in the asylum context. For example, in *Cordero-Trejo,* 40 F.3d at 488-491, the First Circuit separately evaluated each of the ten grounds the BIA cited as indicative of the applicant's lack of credibility, and vacated the BIA's negative credibility ruling because none of the bases was supported by substantial evidence. The INS' own *Asylum Officer Basic Training Workbook on Credibility* (at 28) teaches that "[n]on-material falsehoods cannot be added together to find the applicant ineligible for asylum." Consequently, the government's proposed cumulative approach is not appropriate in this case, because the grounds upon which the BIA relied in making its adverse credibility determination are immaterial to the elements of the asylum definition.[3]

The government nonetheless cites *United States v. Arvizu,* 122 S. Ct. 744 (2002) in an effort to bolster its "cumulative evidence" position. Pet. 19. In *Arvizu*, a criminal caseinvolving suppression of evidence, and having nothing to do

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[3] Contrary to the government's argument (Pet. 19, n.7), such a calculation is entirely different from that governing the evaluation of whether harmful acts amount to persecution. The cumulative approach to assessing whether harm amounts to persecution involves consideration of whether several instances of lesser harms together rise to a level of harm that constitutes persecution. *See, e.g., In re I.Z. and O.Z.*, 22 I. & N. Dec. 23 (BIA 1998). The difference is that in the context of analyzing credibility, the cumulative approach improperly aggregates faulty evidentiary determinations, while the cumulative approach to evaluating whether individual harms to the applicant collectively amount to persecution, aggregates probative evidentiary considerations.

with asylum, this Court held that based on precedent in "reasonable suspicion" traffic stop cases, a law enforcement officer could consider that the totality of the circumstances warranted further investigation. 122 S. Ct. at 751-752. *Arvizu* is thus inapposite to a review of BIA adverse credibility determinations in asylum cases. Consistent with the humanitarian nature of the Refugee Act, the courts, the BIA, and the INS have developed well-settled rules appropriate to reviewing credibility issues involving asylum applicants. These rules, explained above, are necessarily different than those appropriate to traffic stop cases. Moreover, the temporal context of a traffic stop decision is distinct from that of a credibility determination in an asylum case. In a traffic stop, a law enforcement agent must make a quick judgment based on his overall impression of the circumstances in order to decide whether further investigation of possible criminal activity is appropriate. In an asylum case, by contrast, the IJ and the BIA have more time to examine each circumstance so that a quick "totality of the circumstances" impression to assess credibility is not necessary for proper enforcement of the relevant laws.

4. The government argues that the court of appeals' decision in this case is part of a "pattern of overreaching" (Pet. 16) by the Ninth Circuit in its review of the BIA's adverse credibility findings in asylum cases. However, most of the government's quarrel with this "body of circuit law" (Pet. 14) is not presented in this case. The petition criticizes and cites with disapproval *Abovian v. INS*, 219 F.3d 972 (9th Cir. 2000), which held that the BIA may not consider an applicant's failure to support his claim with documentary proof if the applicant testifies credibly. *See* Pet. 13, 14, 16, 18, 24. Not only does petitioner fail to explain what *Abovian* has to do with the instant case, where respondent did, in fact, submit documentary evidence to corroborate his claim (E.R. 169-203), but the BIA also did not address this issue in its opinion. Similarly, *Chen* is not an appropriate vehicle for this Court to review *Shah v. INS*, 220 F.3d 1062 (9th Cir. 2000), since the court

below relied on *Shah* only as an alternative (and less important) ground for its conclusion that respondent's birth records were irrelevant to respondent's credibility. In *Chen,* the court instead rested its determination primarily on the ground that the BIA majority had ignored the long-standing rule that "if discrepancies 'cannot be viewed as attempts by the applicant to enhance his claims of persecution [they] have no bearing on his credibility.'" Pet. App. 7a-8a, *citing Damaize-Job v. INS*, 787 F.2d 1332, 1337 (9th Cir. 1986). The government's critique of *Bandari v. INS*, 227 F.3d 1160 (9th Cir. 2000) is equally misplaced since the Ninth Circuit in this case does not even cite *Bandari*. Finally, the government purports to seek review of a "body of circuit law that relieves the applicant of his burden of proof in asylum cases." Pet. 14. Yet petitioner fails to explain how the court of appeals, by applying well-established principles of judicial review of adverse credibility findings to this case – principles followed by other circuits in asylum cases – has improperly shifted the applicant's burden of proof.[4]

5. In concluding that the three bases the BIA cited could not constitute substantial evidence to support an adverse credibility ruling, the Ninth Circuit not only followed long-settled rules, it correctly applied them to the facts of this case.

Counterfeit birth certificates: The court of appeals properly concluded that there was no substantial evidence to support the BIA's view that the submission in respondent's first asylum case of counterfeit notarial birth records with

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[4] The case at bar does not conflict with *Mejia-Paiz v. INS*, 111 F.3d 720 (9th Cir. 1997), despite the government's suggestion to the contrary. Pet. 15, n.4. *Mejia-Paiz* correctly states that the asylum applicant "bears the burden of persuading the IJ that his evidence is credible." *Id.* at 722. In contrast to *Chen*, however, *Mejia-Paiz* involved discrepancies that "are not minor," not explained, and went to the heart of the applicant's asylum claim. *Id.* at 723-724.

an incorrect birth year undermined his credibility. Pet. App. 8a. First, those certificates were offered to determine whether respondent should be classified as a juvenile or adult for purposes of INS detention, a matter wholly collateral to the asylum claim. *See* E.R. 155, 157 ("Report needed for custody determination. Juvenile vs. adult."). Second, respondent testified that he did not know the certificates were fraudulent and had not noticed the discrepant birth year; he explained that family members had obtained them, and that somebody evidently made a mistake. *Id.* 110-113.

"Minor inconsistencies in the record such as discrepancies in dates which reveal nothing about an asylum applicant's fear for his safety are not an adequate basis for an adverse credibility finding." *See, e.g., Senathirajah*, 157 F.3d at 221 (3d Cir. 1998) (quoting *Vilorio-Lopez v. INS*, 852 F.2d 1137, 1141 (9th Cir. 1988)). Similarly, a plausible explanation can overcome minor discrepancies. *Alvarado-Carillo*, 251 F.3d at 56, citing with approval *Abovian,* 219 F.3d at 979. Where such a date discrepancy is attributable to mistakes by persons other than the applicant – as occurred in the instant case (*see* Pet. App. 7a) – it may be disregarded. *Zubair v. INS,* 191 F.3d 458 (7th Cir. 1999) (unpublished). The BIA itself has recognized that a fraudulent document presented for matters incidental to claims of persecution does not undermine an applicant's credibility because it does not go the heart of his asylum claim. *In re O.D.*, 21 I. & N. Dec. 1079, 1081-82 (BIA 1998). The court of appeals therefore correctly found that since the birth certificates did not "enhance [respondent's] claims of persecution" or "reveal [anything] about his fear for his safety," and because respondent had provided a logical explanation, the BIA improperly discredited respondent on that basis. Pet. App. 8a-10a.

The government also attempts to paint the court of appeals' decision on this issue as "absurd[]" (Pet. 18) and "plainly wrong" (Pet. 17) by citing an interrogation manual for the proposition that a witness's entire testimony can be

discredited if a witness lies on any point, "no matter how irrelevant it may at first appear." Pet. 17 (quoting Jeffrey L. Kestler, *Questioning Techniques and Tactics* § 1:22 (3d ed. 1999)). But the BIA's reasoning in *In re O.D.* plainly illustrates why, whatever the merits of Kestler's technique in an interrogation, the principle does not apply across the board in asylum cases.[5]

Inconsistencies between the two applications: The court below also correctly concluded that the two inconsistencies cited by the BIA between respondent's 1995 and 1998 asylum applications were irrelevant to the question of credibility. The BIA determined that because, unlike the 1998 application, "respondent's 1995 application did not mention coercive population control as a basis of relief," the two applications were "inconsistent * * * with respect to critical aspects of respondent's claim." Pet. App. 20a-21a. But, as the BIA itself noted in setting aside the IJ's determination that the asylum petition was frivolous, this omission was reasonable, given that resistance to China's population control policies was not a viable basis for an asylum claim in 1995. It was not until 1996, when Congress enacted Section 601 of IIRIRA, now codified at 8 USC 1101(a)(42)(B), which made "resistance to a coercive population control program" a ground for asylum, that respondent could seek asylum based on his defiance of China's family planning policies. Pet. App. 22a-24a. The BIA further recognized that "the respondent testified at [his 1999] hearing that in 1995 he suffered persection (sic) on account of *both* his political activities and his violation of coercive population control policies." *Id.* at 23a. (emphasis in

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[5] *In re S.M.J.* also illustrates why the government's endorsement of Kestler's interrogation approach is misplaced in the asylum context. 1997 BIA LEXIS 3,*4 (recognizing that because "this Board, the Immigration Judges, and the Immigration and Naturalization Service are all bound to uphold [the international obligations incorporated into the Refugee Act] * * * a "cooperative approach" is appropriate.)

the original). Noting the BIA's inexplicably inconsistent treatment of this issue, the court of appeals correctly concluded that respondent's "observance of immigration law" could not constitute "a basis for finding him not to be credible." Pet. App. 9a.

The government's citations (Pet. 17-18) to *Jencks v. United States*, 353 U.S. 657, 667 (1957) and *Jenkins v. Anderson*, 447 U.S. 231, 239 (1980) are misplaced. Both *Jencks* and *Jenkins* were decided in a criminal law context completely divorced from the circumstances of this case. Nothing in *Jencks* addresses the proper means of analyzing the circumstances under which previously made statements are in fact probative of a current credibility determination in any context, let alone in an asylum case. The issue in *Jenkins*, the constitutionality of the use of pre-arrest silence to impeach a criminal defendant, has nothing to do with the matter at bar. The *Jenkins* Court noted that a witness could be impeached by his "previous failure to state a fact in circumstances in which that fact naturally would have been asserted" (447 U.S. at 239), but that observation is relevant to *Chen* only insofar as it supports the court of appeals' reasoning. Respondent did not mention his persecution for resistance to family planning in his 1995 asylum application, but that circumstance was plainly not one in which "that fact naturally would have been asserted," since resistance to China's population control policies was not a viable basis for an asylum claim in 1995.

The second discrepancy between the two applications that the BIA cites for regarding Chen as incredible is also immaterial to his asylum claim and explained by record evidence. The BIA correctly notes that respondent marked "single" on his first application, while in his second application, he indicated that he married in 1994, prior to his first arrival in the U.S. Pet. App. 20a-21a. Although the government tries to characterize this discrepancy as central to respondent's asylum application, and therefore probative of his lack of credibility, the record

shows otherwise. Respondent testified that the Chinese government considered his marriage to be illegal, because he and his wife were underage when they married. Yet, despite his government's view, respondent and his wife clearly considered themselves married. E.R. 82, 86. Under such circumstances, respondent reasonably was confused about how he should characterize his marital status on an official government document such as his asylum application. A reasonable adjudicator, cognizant of respondent's circumstances as set forth in the administrative record, would be compelled to conclude that the BIA's finding on this point required reversal.

Further, 8 U.S.C. 1101(a)(42)(B) provides that asylum may be based on persecution the applicant suffered or reasonably fears "for resistance to a coercive population control program." Nowhere does the statute require that an applicant be married or that the applicant's resistance to coercive population control policies occur in the context of marriage. The wording of the statute simply contemplates that asylum can be granted based on resistance to such policies, regardless of whether the applicant is married or not. Consequently, respondent's marking on his second asylum application that he is married does nothing to enhance his claim. For this reason, too, the record compelled reversal of the BIA on the issue of "inconsistent" applications.

General inconsistency and vagueness: The court of appeals concluded that the BIA's assertion that respondent's "second application and testimony was * * * inconsistent or vague" was not supported by any "specific, cogent reason." Pet. App. 10a. The BIA's basis for regarding respondent as "inconsistent or vague" was its belief that he testified inconsistently about the location of his wife and son, and that, although the record contains an abortion notice from family planning officials, respondent did not testify about it. Pet. App. 21a.

The record shows no inconsistency or vagueness in respondent's testimony concerning the whereabouts of his

wife and son. Respondent simply stated that his son lives with his family, and that his wife and son "are together." E.R. 83, 84, 114, 128. He also explained that his wife is in contact with his side of the family and had stayed with them, and that she and their son move frequently to avoid apprehension by family planning authorities. *Id.* at 120, 121. This evidence, coupled with the fact that respondent is in the U.S. while his wife and son both remain in China, demonstrates that no contradiction or vagueness exists on this point.

The court of appeals also correctly pointed out that Chen did testify about the abortion notice. Pet. App. 10a. The record shows that when the INS cross-examined Chen about the notice, he responded in a straightforward manner. E.R. 118-119. The court of appeals properly concluded that the BIA's reliance on the abortion notice did not amount to substantial evidence that could support a negative credibility determination. Pet. App. 10a.

6. Having found that none of the bases relied upon by the BIA for its disbelief of Chen was supported by substantial evidence, the court below correctly concluded that the BIA's adverse credibility decision could not stand. The government has failed to show why this ruling warrants a grant of certiorari.

II. THE DECISION OF THE COURT BELOW NOT TO REMAND ON THE MERITS WHERE THE RECORD CLEARLY ENTITLES RESPONDENT TO RELIEF DOES NOT VIOLATE PRINCIPLES OF ADMINISTRATIVE LAW AND IS CONSISTENT WITH DECISIONS IN OTHER CIRCUITS.

1. Although in the instant case, the court of appeals reversed the BIA, concluding that respondent is entitled to withholding of removal and eligible for asylum, the court remanded to the BIA for the Attorney General to consider the issue of whether respondent qualifies for asylum as a matter of discretion (Pet. App. 15a), thus according the

agency the extra deference due on discretionary questions. While withholding prohibits returning the alien to the country where he has established a clear probability of persecution, it does not bar removal to another country that will accept him, and does not bestow the right to apply for permanent residence and eventually, for citizenship, as a grant of asylum does. *See, e.g., Cardoza-Fonseca,* 480 U.S. at 429 n.6. Remand to the Attorney General for the exercise of his discretion on the question of asylum thus preserves his authority over asylum matters, and given that asylum confers far greater benefits than withholding of removal, also preserves his power more generally over immigration.

2. The court of appeals' decision to grant respondent's application for withholding of removal and determine respondent eligible for asylum comports with the doctrine of primary jurisdiction, which contemplates that a reviewing court will defer "initial decision-making responsibility" to the agency. 2 Pierce, Administrative Law Treatise § 14.1, at 918 (2002). The Ninth Circuit recognizes that courts of appeals reviewing decisions of the BIA do "not sit as an administrative agency for the purpose of fact-finding in the first instance." *Tejeda-Mata v. INS*, 626 F.2d 721, 726 (9th Cir. 1980). Consequently, the Ninth Circuit remands to the BIA when an evidentiary issue necessitates consideration in the first instance by the BIA or IJ. *See Khan v. INS*, 237 F.3d 1143, 1144 (9th Cir. 2001). The Ninth Circuit also remands to the BIA where the administrative record is not sufficiently clear to allow judicial review. *See Paramasamy v. Ashcroft*, 295 F.3d 1047, 1054 (9th Cir. 2002) (concluding that a remand to the BIA was appropriate because "this is not a case where we can say with the requisite certainty that the Board would have been unreasonable in denying relief").

Contrary to the government's view, respect for the primary jurisdiction of administrative agencies does not relieve courts of their authority to review and reverse final agency determinations. A court may award relief denied by an agency rather than remanding if "the underlying law

and facts are such that the agency has no discretion to act in any other manner," and remand to the agency would merely "further delay . . . the action to which the petitioner is clearly entitled." 3 Pierce, Administrative Law Treatise § 18.1, at 1324 (2002) citing *Faucher v. Secretary of Health & Human Servs.*, 17 F.3d 171, 176 (6th Cir. 1994) (court may reverse agency decision and award requested relief "if all essential factual issues have been resolved and the record adequately establishes a plaintiff's entitlement to benefits." *See also Seavey v. Barnhart*, 276 F.3d 1, 11 (1st Cir. 2001) (court could order relief without remand "if the evidence and law compelled" such a conclusion)); *Hutsell v. Massanari,* 259 F.3d 707, 714 (8th Cir. 2001); *Davis v. Shalala*, 985 F.2d 528, 534 (11th Cir. 1993); *Ivy v. Sullivan,* 898 F.2d 1045, 1049 (5th Cir. 1990); *Harris v. Secretary of Health and Human Servs.*, 821 F.2d 541, 545 (10th Cir. 1987); *Mowerey v. Heckler*, 771 F.2d 966, 973 (6th Cir. 1985). The court of appeals followed this well-established principle in *Chen*. Having determined that the BIA's adverse credibility determination was not supported by substantial evidence, the court reviewed "the complete administrative record" to determine whether it "would be compelled to reverse [the BIA] decision" denying relief and therefore, whether remand to the BIA was unnecessary. Pet. App. 10a. This process did not require the court of appeals to "render[] its own findings of fact" (Pet. 21) or raise questions "in the first instance" (Pet. 20) since as the government acknowledges, the IJ already considered the merits of respondent's claims if his testimony were deemed credible (Pet. 26). The BIA, moreover, held "that the evidence presented does not satisfy the applicable burden of proof for either asylum or withholding of removal under the Act." Pet. App. 24a. The agency created a complete administrative record, 275 pages long, on which the court of appeals relied to make a final determination, thus fulfilling the purpose of the primary jurisdiction doctrine: to allow an agency to render the initial determination on the issues in the case.

The government's reliance on *Port of Portland v. United States*, 408 U.S. 811, 842 (1972), *Nader v. Allegheny Airlines Inc.*, 426 U.S. 290, 303-304 (1976), and *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943) is inapposite because *Chen* did not require the resolution of new facts or "issues the agency did not consider." (Pet. 21).[6] Accordingly, the government's position that the court of appeals conducted a de novo review of the agency's decision is also without foundation. Judicial review of an administrative decision requires consideration of "all of the evidence in the record as a whole, not just the evidence that is consistent with the agency's finding." 2 Pierce, Administrative Law Treatise §11.2 at 772 (2002). *See also Universal Camera Corp. v. NLRB,* 340 U.S. 474, 488-90 (1951). Consistent with this precept, and because no issues remained for which the agency needed to make an initial determination, the court of appeals reviewed the agency's determination in light of the entire record, and found that respondent was entitled to withholding of removal and eligible for asylum.

3. Although the government characterizes the administrative record as "bare" (Pet. 24), it is vague as to what exactly is missing. The government seems to suggest that a remand is necessary for the agency to reconsider whether: the presumption that respondent has a well-founded fear of persecution has been rebutted; he was

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[6] The government's assertion (Pet. 21) that the court of appeals' approach runs afoul of this Court's decision in *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) is without merit. This Court's analysis in *Lorion* focused on why the court of appeals, rather than the district court, had jurisdiction to review a determination by the Nuclear Regulatory Commission. In the course of this discussion, the Court recited a basic tenet of judicial review of agency action, namely, that remand to the agency is the ordinary course of action. But nowhere does *Lorion* address the circumstances in which remand would not be the proper course of action, probably because the issue of whether or not to remand to the agency was not central to the court's holding. *Id.*

pursued, detained, and beaten for reasons other than his resistance to coerced family planning; based on "information about the conditions" in China, "prospective from the date of the court's decision," relief would still be warranted (Pet. 24-27). But the court of appeals did not rely on the rule that past persecution creates a rebuttable presumption of future persecution. *See* Pet. App. 14a ("Notwithstanding this presumption, we also find that Chen meets the subjective and objective elements of proving his well-founded fear"). Further, the government has not argued that there is new information that might establish a fundamental change in circumstances in China's population control policy such that respondent would no longer have a well-founded fear or clear probability of persecution, and seems unlikely to do so now, given the government's present stand on that issue. *See infra,* at 27-28. The government's position that the Attorney General must be given an opportunity to address an applicant's fear of future persecution prospectively from the date of the court's decision, would create a never-ending loop of judicial review from which an asylum applicant could never escape. For *any* time a court of appeals reverses a BIA decision denying withholding of removal, the Attorney General could argue that since relief from removal "is inherently prospective in nature" (Pet. 25) the case must be remanded to the BIA for further consideration. *See Nelson v. United States*, 64 F. Supp. 2d 1318, 1326 (N.D. Ga. 1999) (If an agency were entitled to a "second bite at the apple" every time it made an erroneous decision, "administrative law would be a never ending loop from which aggrieved parties would never receive justice," quoting *McDonnell Douglas Corp. v. National Aeronautics & Space Corp.*, 895 F. Supp. 316, 319 (D.D.C. 1995); *cf. INS v. Abudu,* 485 U.S. 94, 107 (1988) ("There is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving adversaries a fair opportunity to develop and present their respective cases.").

4. The government's claim that there is "no direct evidence" that respondent was beaten and pursued because of his resistance to family planning policies (Pet. 8, 26-27) is inapposite. This Court does not require "direct evidence" of motive for persecution; only "some evidence, direct or circumstantial" must be presented. *Elias-Zacarias,* 502 U.S. at 483. Here, the record clearly shows that: respondent was pursued by family planning authorities (E.R. 86-91, 102, 122-127, 200, 218); such authorities frequently inflict harsh punishments on individuals who have resisted forced population control, including detention and beating (*Id.* 176-193, 269-275); and Chinese officials detained and severely beat respondent when INS returned him. *Id.* 95-99; 129. Equally unavailing is the government's position that "a reasonable inference might be that respondent was punished in Shanghai for leaving China illegally."(Pet. 27). The government provides no cite in the record to support this position, and in any event, illegal departure combined with other manifestations of defiance of government authorities can give rise to persecution on account of political opinion. *See* E.R. 106; *Chang v. INS*, 119 F.3d 1055, 1062-65 (3rd Cir. 1997). The government's assertion that the record does not show that the authorities wanted to detain respondent in 1995 because of his wife's pregnancy (Pet. 26-27) is also wrong. Respondent's testimony (E.R. 86-91, 102, 122-127), his wife's abortion notice (*Id.* 220), and corroborating country conditions information is strong evidence that resistance to forced family planning was the motive for the government's pursuit.

As contemplated by this Court in *Elias-Zacarias,* the administrative record in the instant case contains compelling circumstantial evidence that Chinese authorities persecuted respondent on account of his challenges to Chinese policies, including coerced population control; that a reasonable person in respondent's circumstances would fear persecution; and that a clear probability of such persecution exists in the future. Because a reasonable person in respondent's circumstances would fear this persecution, any

reasonable adjudicator would be compelled to conclude that, contrary to the BIA's decision in this case, respondent is eligible for asylum and entitled to withholding of removal.

5. The government's suggestion that a "new, independent determination regarding withholding of removal" (*id.* at 22) is necessary because an applicant must meet a higher standard of proof for withholding than for asylum eligibility is without foundation. The IJ evaluated respondent's claims for withholding of removal and asylum eligibility, so the administrative record before the court of appeals was complete with respect to both claims. Moreover, both claims are based on the same set of facts, and therefore no additional fact-finding would be necessary in order to consider the withholding of removal claim. The government's position is further belied by this Court's decision that "those who can show a clear probability of persecution are *entitled* to mandatory suspension of deportation and are *eligible* for discretionary asylum." *Cardoza-Fonseca*, 480 U.S. at 444 (emphasis in original).[7] *See also INS v. Doherty,* 502 U.S. 314, 332 (1992) (Scalia, J. concurring/dissenting) ("Because of the mandatory nature of the withholding-of-deportation provision, the Attorney General's

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[7] In this regard, the government's reliance on *FPC v. Idaho Power Co.*, 344 U.S. 17, 20 (1952), is misplaced. *Idaho Power Co.* addressed a situation where an appellate court, after finding that the Federal Power Commission (FPC) had improperly attached conditions to a license, instead of remanding, ordered the agency to issue the license without the conditions. *Id.* at 20. This Court stated that such an action usurped an important administrative function, because it precluded the Commission from considering whether an alternative course, such as withholding consent to any license, might better fulfill its mandate to coordinate and oversee energy development. *Id.* Here, no comparable problem exists, because where a respondent shows a clear probability of persecution, the only alternative to withholding is asylum, and the court remanded to the Attorney General the question of whether asylum should be granted as a matter of discretion.

power to deny withholding claims differs significantly from his broader authority to administer discretionary forms of relief such as asylum. . . . ").

6. The government cites several cases for the proposition that the Ninth Circuit purportedly "makes its own findings and usually awards withholding * * * [and] sometimes seeks to justify its award of relief by invoking the presumption of future persecution that arises by regulation in administrative proceedings when there has been a finding of past persecution," or by rendering "its own assessment in the first instance of the evidence and its weight." Pet. 22-23. But in *Chen*, the court below neither made its own findings, nor assessed the evidence in the first instance. Instead, it reviewed the administrative record and the findings of the BIA. *See* Pet. App. 4a. Nor did it rely on a presumption of future persecution simply because respondent had been persecuted in the past. *See supra,* at 19. Consequently, *Chen* is not a suitable vehicle for the government to challenge these other Ninth Circuit cases.

7. The Ninth Circuit declines to remand an asylum case only where: the agency had the first opportunity to consider the key factual and legal issues; there is a complete administrative record; and, "on the record * * * it is clear that [the court] would be compelled to reverse [the BIA's] decision if it had decided the matter against the applicant." *Navas v. INS,* 217 F.3d 646, 662 (9th Cir. 2000). This approach is consistent with the practices of other circuits. The Third Circuit, for example, has adopted the view that no remand to the BIA is necessary where a reasonable fact-finder would be compelled to conclude that the asylum applicant has established his or her claims. Thus, in *Chang,* 119 F.3d 1055, the court reversed a BIA decision denying asylum and withholding of deportation, declining to remand the case to the BIA. The court noted that the scope of review of a BIA decision denying asylum and withholding is narrow *(id.* at 1060), and that reversal is proper "only if a reasonable fact-finder would be forced

to conclude that [the applicant] has shown the requisite fear of persecution." *Id.* at 1065-66 (citing *Elias-Zacarias,* 502 U.S. at 481). After reviewing the administrative record, paying particular attention to those aspects related to the BIA's reasons for denying the relief requested, the court determined that *Chang* presented such a situation, and accordingly, reversed the BIA and granted withholding of removal and eligibility for asylum. 119 F.3d at 1068. *See also Li Wu Lin v. INS*, 238 F.3d 239, 244 (3d Cir. 2001) (reversing BIA decision "wholly unsupported by the record," and concluding that applicant "satisfied both the standards for political asylum and those for withholding of deportation"); *Ezeagwuna v. Ashcroft*, No. 01-3294, 2002 U.S. App. LEXIS 15278 (3d Cir. July 30, 2002) (overturning the BIA's adverse credibility determination, and reversing the BIA's denial of asylum on the merits and withholding because based on the administrative record, a reasonable fact-finder would be compelled to do so). Similarly, in *Fergiste v. INS*, 138 F.3d 14, 20 (1998), the First Circuit reversed a decision by the BIA denying asylum and withholding, and concluded that a remand for further fact-finding was "not necessary in this case," because the record below justified an immediate grant of relief.

8. The cases the government cites in support of its proposition that the Ninth Circuit's decision in *Chen* conflicts with other circuits (Pet. 27) differ from the present case in crucial respects that made remand appropriate in those cases. In *Yang v. McElroy*, 277 F.3d 158 (2d Cir. 2002), after reversing the BIA's denial of asylum, the court remanded because of a specific deficiency in the record that required development by the agency. The court found that "[t]he BIA in 1998 affirmed a 1994 decision of the IJ predicated primarily on a 1993 State Department Country Report." *Id.* at 163. In deciding to remand Yang's case to the BIA, the court emphasized "the significant time gap between the 1993 State Department Country Report and the time of the proposed deportation," and the fact that the agency's denial of asylum centered on country

conditions evidence regarding treatment of dissidents that was more than eight years old. *Id.* Similarly, in *Begzatowski v. INS*, 278 F.3d 665, 671-72 (7th Cir. 2002), the court reversed the BIA's conclusion that the applicant had not suffered persecution in Macedonia, but remanded to the BIA to consider whether the applicant's fear of future persecution was rebutted by recent State Department reports on changed country conditions in the seven years since the applicant's initial request for asylum.

Chen differs from *Yang* and *Begzatowki* in several ways. In *Chen,* country conditions evidence in the record, submitted in April 1999, includes documents published in 1998 and 1999. E.R. 169-275. Consequently, the time lag between the date of this evidence, the BIA's decision in April 2000, and the court of appeals' ruling in September 2001 is not nearly as great as in either of those cases. Unlike in *Yang*, in *Chen*, the agency did not primarily base its denial of asylum on country conditions information, referring only incidentally to "State Department reports" (Pet. App. 56a). And, in contrast to both *Yang* and *Begzatowski*, the administrative record in *Chen* contains evidence still central to respondent's asylum claim, namely, testimony at Congressional hearings in 1998 confirming that Chinese authorities persist in severe persecution of persons who resist official population control policies by flouting the age requirement for marriage and then seek to have a child. E.R. 181-187. Particularly in light of recent findings by the Executive branch that Chinese officials clearly continue to use "coercive elements in law and practice" against those who resist population control policies (*see infra*, at 27-28), remand to the BIA for current country conditions evidence is not necessary in the instant case.

In *Alvarado-Carillo*, 251 F.3d at 56, the court reversed the BIA's adverse credibility determination and remanded because the applicant had not had the opportunity "to address * * * items raised sua sponte in the BIA Opinion," which would have rendered him ineligible for asylum –

again, a concern not at issue in *Chen*. *Stewart v. INS*, 181 F.3d 587 (4th Cir. 1999) involved an entirely different proceeding from the one presented here: a motion to reopen deportation proceedings to apply for adjustment of status based on the applicant's marriage to a United States citizen. In affirming the BIA's decision to deny the applicant's motion, the court noted that if it were to reverse the BIA's decision, it would remand the case to the BIA for first consideration of the merits of the application (*id.* at 595 n.6), an approach that has nothing to do with review of a denial of an asylum application, especially where, as here, the agency has already considered the issues, and the court's review relied on a complete agency record. In *Gailius*, 147 F.3d 34, the court remanded after reversing the BIA because the IJ and the BIA "failed to address much of [the] evidence" or even make a "determination of credibility" in the first instance. *Id.* at 47. In the instant case, the agency considered the evidence marshaled by respondent and made a credibility determination that the court of appeals could review. The passage cited by the government from *Rhoa-Zamora v. INS*, 971 F.2d 26 (7th Cir. 1992) is also inapposite. While the *Rhoa-Zamora* court did announce that it "will not weigh evidence that the [BIA] has not previously considered," it did so in response to the applicant's request that the court consider new evidence never presented to the BIA. *Id.* at 34. In *Chen*, by contrast, the court of appeals could (and did) base its decision on evidence already in the agency record.

9. The application of the primary jurisdiction doctrine to require remand in this case would be especially inappropriate in light of the harm to respondent. *See National Communications Ass'n v. AT&T*, 46 F.3d 220, 223 (2d Cir. 1995) ("A court should be reluctant to invoke the doctrine of primary jurisdiction, which often, but not always, results in added expense and delay to the litigants where the nature of the action deems the application of the doctrine inappropriate."). *See also Sierra Club v. Peterson*, 185 F.3d 349, 369-70 (5th Cir. 1999). Contrary to the

government's implication that respondent would not suffer from the delay created by a remand on the merits (Pet. 25), remand would virtually guarantee that he would still be detained, causing him harm as well as significant unnecessary expense to the government. An INS district director is accorded nearly complete discretion to detain arriving aliens, such as respondent, without bond, particularly once an order of removal has been entered. *See, e.g.*, 8 C.F.R. 235.3(4)(ii); 236.1; 241.4. Here, the INS detained respondent from his arrival in 1998 until October 24, 2001, releasing him only after the court of appeals granted withholding of removal. INS Order of Release (Resp. App. 17a) (indicating that the INS released respondent because the court of appeals granted him withholding).

10. The government maintains, incorrectly, that the court of appeals erred in reversing the instant case without remand, because the decision "may implicate a determination of policy or judgment which the agency alone is authorized to make." Pet. 24, citing *SEC v. Chenery*, 318 U.S. 388. Similarly, the government alleges that the decision threatens "foreign affairs, national defense, and [the government's power over] defining the national community" (Pet. 21) by usurping "a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Id.* at 28 (quoting *Shaughnessy v. Mezei*, 345 U.S. 206, 210 (1953)). The government's characterization of the court of appeals' role in this case is inapt. The court granted respondent's application for withholding of removal and found him eligible for asylum pursuant to its authority under 8 U.S.C. 1252, in which Congress specifically contemplated judicial review of BIA determinations in asylum cases, and 8 U.S.C. 1101(a)(42)(B), in which Congress determined that resistance to coercive population control policies is a ground for asylum. While this Court generally disfavors reversals of BIA decisions that may implicate foreign policy issues traditionally in the realm of the executive, such a concern is misplaced here. When it enacted the IIRIRA in 1996, Congress explicitly provided that an

individual persecuted for "resistance to a coercive population control program" is considered a "refugee" eligible for asylum. 8 U.S.C. 1101(a)(42)(B). This statutory change, which overruled the BIA's 1989 holding that China's "one family-one child" policy was not persecutory on its face (*Matter of Chang*, 20 I. & N. Dec. 38), was prompted by extensive evidence gathered at congressional hearings on China's coercive population control policies. *See Coercive Population Control in China: Hearings Before the Subcomm. on the Int'l Operations & Human Rights of the House Comm. on Int'l Relations*, 104th Cong. (1995); 142 Cong. Rec. 6008 (1996) (describing China's forced abortion and forced sterilization practices as among the "most gruesome human rights violations"); *Zhao v. United States Dep't of Justice*, 265 F.3d 83, 91-93 (2d Cir. 2001).

Substantially similar findings recently led the Administration last month to conclude that the United States is precluded from making contributions to the United Nations Population Fund (UNFPA) by the Kemp-Kasten amendment, which provides that no funds may be given to any organization which "supports or participates in the management of a program of coercive abortion or involuntary sterilization" (Pub. L. No. 107-115), because of UNFPA's operations in China. *See* U.S. Dep't of State, *Press Statement: FY 2002 Funding for the UN Population Fund* (July 22, 2002). This conclusion was based on the report of an assessment team that traveled to China in May 2002 at the request of the Secretary of State, and concluded that "China's population practices," which "retain coercive elements in law and in practice," amount to a "program of coercive abortion," and that the Chinese government "has recently confirmed these kinds of policies on a national basis." Bureau of Population, Refugees, and Migration, U.S. Dep't of State, *Analysis of Determination that Kemp-Kasten Amendment Precludes Further Funding to UNFPA under Pub. L. 107-115* (July 18, 2002). The case at bar thus presents the unique situation of a refugee whose grounds for seeking withholding of removal and asylum have been explicitly confirmed based on findings by both

the Legislative and Executive Branches. A less apt candidate for remand for "a determination of policy or judgment" (Pet. 24) by the Executive is difficult to imagine.[8]

11. The government seeks to persuade this Court that there is a crisis in the Ninth Circuit which "compromises enforcement of the immigration laws." Pet. 29. Yet, in addition to the irrelevance of this argument to the case at bar, government statistics and other pertinent data show that no such crisis exists. According to the government, EOIR has calculated that its adjudicators complete 50,000 to 75,000 asylum cases annually, of which approximately one-third arise in the Ninth Circuit (Pet. 29), i.e. roughly 17,000 to 25,000 – or an average of 21,000 cases. The government states that the Ninth Circuit decided 333 asylum cases in FY 2001, but does not identify a specific source for that data. Pet. 21. These 333 asylum cases would roughly amount to only 1.6% of 21,000 cases. Using Lexis and Westlaw, respondent has only been able to identify 188 reported and unreported asylum decisions by the Ninth Circuit in FY 2001. A review of those decisions demonstrates that 75% of the time (in 133 out of 188 cases), the Ninth Circuit affirmed the BIA. The court reversed without remanding on the merits in only 28 cases (15% of 188), and, in each of these, remanded to the BIA to exercise its discretion whether or not to grant asylum. Twenty-eight cases would represent only 0.1% of the 21,000 asylum cases "that occur[red] within the Ninth Circuit" (Pet. 21) in FY 2001. Such a small percentage

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[8] The other cases cited by the government, *Fiallo v. Bell*, 430 U.S. 787 (1977), *Kleindienst v. Mandel*, 408 U.S. 753 (1972), and *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952), are also irrelevant here. Those cases involved the deference the judiciary affords Congress in assessing the constitutionality of immigration laws. *Chen* does not involve a challenge, constitutional or otherwise, to the authority of Congress over immigration laws.

neither undercuts the enforcement of immigration laws, nor warrants this Court's intervention.

12. The present case establishes that the court below applied the proper standard of review, one entirely consistent with other circuits, and with principles of primary jurisdiction and deference to the agency. Accordingly, as with the question of credibility, this Court should deny the petition for a writ of certiorari on the issue of remand.

At most, the government's reliance on a purported principle of administrative law that the courts must always remand cases to administrative agencies rather than granting relief outright would only establish that *Chen* should be held pending this Court's resolution of *United States v. Bean*, No. 01-704. In *Bean*, the government contends that if a federal court reverses the Bureau of Alcohol, Tobacco and Firearms' refusal to reinstate an individual's firearms rights, the matter must be remanded to the agency. The government rests this argument on the identical authorities – *e.g.*, *Florida Power & Light Co. v. Lorion* and *FPC v. Idaho Power Co.* – that it invokes in its petition in this case. *See generally* 01-704 Reply Br. 5-7. As such, this Court's decision in *Bean* would have a significant influence on the outcome of the question regarding remand in *Chen*.

CONCLUSION

The petition for a writ of certiorari should be denied, or in the alternative, this case should be held pending this Court's decision in *U.S. v. Bean*.

Respectfully submitted,

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APPENDIX A

REGULATORY PROVISIONS INVOLVED (IN ADDITION TO STATUTORY AND REGULATORY PROVISIONS CITED IN PETITION APPENDIX E)

1. Section 208.13 of Title 8 of the Code of Federal Regulations provides as follows:

§ 208.13 Establishing asylum eligibility.

(a) Burden of proof. The burden of proof is on the applicant for asylum to establish that he or she is a refugee as defined in section 101(a)(42) of the Act. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration. The fact that the applicant previously established a credible fear of persecution for purposes of section 235(b)(1)(B) of the Act does not relieve the alien of the additional burden of establishing eligibility for asylum.

(b) Eligibility. The applicant may qualify as a refugee either because he or she has suffered past persecution or because he or she has a well-founded fear of future persecution.

(1) Past persecution. An applicant shall be found to be a refugee on the basis of past persecution if the applicant can establish that he or she has suffered persecution in the past in the applicant's country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion, and is unable or unwilling to return to, or avail himself or herself of the protection of, that country owing to such persecution. An applicant who has been found to have established such

past persecution shall also be presumed to have a well-founded fear of persecution on the basis of the original claim. That presumption may be rebutted if an asylum officer or immigration judge makes one of the findings described in paragraph (b)(1)(i) of this section. If the applicant's fear of future persecution is unrelated to the past persecution, the applicant bears the burden of establishing that the fear is well-founded.

> **(i) Discretionary referral or denial.** Except as provided in paragraph (b)(1)(iii) of this section, an asylum officer shall, in the exercise of his or her discretion, refer or deny, or an immigration judge, in the exercise of his or her discretion, shall deny the asylum application of an alien found to be a refugee on the basis of past persecution if any of the following is found by a preponderance of the evidence:
>
> > **(A)** There has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in the applicant's country of nationality or, if stateless, in the applicant's country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion; or
> >
> > **(B)** The applicant could avoid future persecution by relocating to another part of the applicant's country of nationality or, if stateless, another part of the applicant's country of last habitual residence, and under all the

circumstances, it would be reasonable to expect the applicant to do so.

(ii) Burden of proof. In cases in which an applicant has demonstrated past persecution under paragraph (b)(1) of this section, the Service shall bear the burden of establishing by a preponderance of the evidence the requirements of paragraphs (b)(1)(i)(A) or (B) of this section.

(iii) Grant in the absence of well-founded fear of persecution. An applicant described in paragraph (b)(1)(i) of this section who is not barred from a grant of asylum under paragraph (c) of this section, may be granted asylum, in the exercise of the decision-maker's discretion, if:

(A) The applicant has demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution; or

(B) The applicant has established that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country.

(2) Well-founded fear of persecution.

(i) An applicant has a well-founded fear of persecution if:

(A) The applicant has a fear of persecution in his or her country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality,

membership in a particular social group, or political opinion;

(B) There is a reasonable possibility of suffering such persecution if he or she were to return to that country; and

(C) He or she is unable or unwilling to return to, or avail himself or herself of the protection of, that country because of such fear.

(ii) An applicant does not have a well-founded fear of persecution if the applicant could avoid persecution by relocating to another part of the applicant's country of nationality or, if stateless, another part of the applicant's country of last habitual residence, if under all the circumstances it would be reasonable to expect the applicant to do so.

(iii) In evaluating whether the applicant has sustained the burden of proving that he or she has a well-founded fear of persecution, the asylum officer or immigration judge shall not require the applicant to provide evidence that there is a reasonable possibility he or she would be singled out individually for persecution if:

(A) The applicant establishes that there is a pattern or practice in his or her country of nationality or, if stateless, in his or her country of last habitual residence, of persecution of a group of persons similarly situated to the applicant on account of race, religion,

nationality, membership in a particular social group, or political opinion; and

(B) The applicant, establishes his or her own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable.

(3) Reasonableness of internal relocation. For purposes of determinations under paragraphs (b)(1)(i), (b)(1)(ii), and (b)(2) of this section, adjudicators should consider, but are not limited to considering, whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties. Those factors may, or may not, be relevant, depending on all the circumstances of the case, and are not necessarily determinative of whether it would be reasonable for the applicant to relocate.

(i) In cases in which the applicant has not established past persecution, the applicant shall bear the burden of establishing that it would not be reasonable for him or her to relocate, unless the persecution is by a government or is government-sponsored.

(ii) In cases in which the persecutor is a government or is government-sponsored, or the applicant has established persecution in the past, it shall be presumed that internal relocation would not be reasonable, unless the Service establishes by a preponderance of the evidence that, under all the

circumstances, it would be reasonable for the applicant to relocate.

* * *

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2. Section 208.16 of the Code of Federal Regulations provides as follows:

§ 208.16 Withholding of removal under section 241(b)(3)(B) of the Act and withholding of removal under the Convention Against Torture.

(a) Consideration of application for withholding of removal. An asylum officer shall not decide whether the exclusion, deportation, or removal of an alien to a country where the alien's life or freedom would be threatened must be withheld, except in the case of an alien who is otherwise eligible for asylum but is precluded from being granted such status due solely to section 207(a)(5) of the Act. In exclusion, deportation, or removal proceedings, an immigration judge may adjudicate both an asylum claim and a request for withholding of removal whether or not asylum is granted.

(b) Eligibility for withholding of removal under section 241(b)(3) of the Act; burden of proof. The burden of proof is on the applicant for withholding of removal under section 241(b)(3) of the Act to establish that his or her life or freedom would be threatened in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration. The evidence shall be evaluated as follows:

(1) Past threat to life or freedom.

(i) If the applicant is determined to have suffered past persecution in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion, it shall be presumed that the applicant's life or freedom would be threatened in the future in the country of removal on the basis of the original claim. This presumption may be rebutted if an asylum officer or immigration judge finds by a preponderance of the evidence:

> **(A)** There has been a fundamental change in circumstances such that the applicant's life or freedom would not be threatened on account of any of the five grounds mentioned in this paragraph upon the applicant's removal to that country; or
>
> **(B)** The applicant could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so.

(ii) In cases in which the applicant has established past persecution, the Service shall bear the burden of establishing by a preponderance of the evidence the requirements of paragraphs (b)(1)(i)(A) or (b)(1)(i)(B) of this section.

(iii) If the applicant's fear of future threat to life or freedom is unrelated to the past persecution, the applicant bears the

burden of establishing that it is more likely than not that he or she would suffer such harm.

(2) Future threat to life or freedom. An applicant who has not suffered past persecution may demonstrate that his or her life or freedom would be threatened in the future in a country if he or she can establish that it is more likely than not that he or she would be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion upon removal to that country. Such an applicant cannot demonstrate that his or her life or freedom would be threatened if the asylum officer or immigration judge finds that the applicant could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so. In evaluating whether it is more likely than not that the applicant's life or freedom would be threatened in a particular country on account of race, religion, nationality, membership in a particular social group, or political opinion, the asylum officer or immigration judge shall not require the applicant to provide evidence that he or she would be singled out individually for such persecution if:

(i) The applicant establishes that in that country there is a pattern or practice of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and

(ii) The applicant establishes his or her own inclusion in and identification with

such group of persons such that it is more likely than not that his or her life or freedom would be threatened upon return to that country.

(3) Reasonableness of internal relocation. For purposes of determinations under paragraphs (b)(1) and (b)(2) of this section, adjudicators should consider, among other things, whether the applicant would face other serous harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties. These factors may or may not be relevant, depending on all the circumstances of the case, and are not necessarily determinative of whether it would be reasonable for the applicant to relocate.

(i) In cases in which the applicant has not established past persecution, the applicant shall bear the burden of establishing that it would not be reasonable for him or her to relocate, unless the persecutor is a government or is government-sponsored.

(ii) In cases in which the persecutor is a government or is government-sponsored, or the applicant has established persecution in the past, it shall be presumed that internal relocation would not be reasonable, unless the Service establishes by a preponderance of the evidence that under all the circumstances it would be reasonable for the applicant to relocate.

(c) Eligibility for withholding of removal under the Convention Against Torture.

(1) For purposes of regulations under Title II of the Act, "Convention Against Torture" shall refer to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention, as implemented by section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 (Pub.L. 105-277, 112 Stat. 2681, 2681-821). The definition of torture contained in § 208.18(a) of this part shall govern all decisions made under regulations under Title II of the Act about the applicability of Article 3 of the Convention Against Torture.

(2) The burden of proof is on the applicant for withholding of removal under this paragraph to establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.

(3) In assessing whether it is more likely than not that an applicant would be tortured in the proposed country of removal, all evidence relevant to the possibility of future torture shall be considered, including but not limited to:

(i) Evidence of past torture inflicted upon the applicant;

(ii) Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured;

(iii) Evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and

(iv) Other relevant information regarding conditions in the country of removal.

(4) In considering an application for withholding of removal under the Convention Against Torture, the immigration judge shall first determine whether the alien is more likely than not to be tortured in the country of removal. If the immigration judge determines that the alien is more likely than not to be tortured in the country of removal, the alien is entitled to protection under the Convention Against Torture. Protection under the Convention Against Torture will be granted either in the form of withholding of removal or in the form of deferral of removal. An alien entitled to such protection shall be granted withholding of removal unless the alien is subject to mandatory denial of withholding of removal under paragraphs (d)(2) or (d)(3) of this section. If an alien entitled to such protection is subject to mandatory denial of withholding of removal under paragraphs (d)(2) or (d)(3) of this section, the alien's removal shall be deferred under § 208.17(a).

(d) Approval or denial of application.

(1) General. Subject to paragraphs (d)(2) and (d)(3) of this section, an application for withholding of deportation or removal to a country of proposed removal shall be granted if the applicant's eligibility for withholding is established pursuant to paragraphs (b) or (c) of this section.

(2) Mandatory denials. Except as provided in paragraph (d)(3) of this section, an application for withholding of removal under

section 241(b)(3) of the Act or under the Convention Against Torture shall be denied if the applicant falls within section 241(b)(3)(B) of the Act or, for applications for withholding of deportation adjudicated in proceedings commenced prior to April 1, 1997, within section 243(h)(2) of the Act as it appeared prior to that date. For purposes of section 241(b)(3)(B)(ii) of the Act, or section 243(h)(2)(B) of the Act as it appeared prior to April 1, 1997, an alien who has been convicted of a particularly serious crime shall be considered to constitute a danger to the community. If the evidence indicates the applicability for one or more of the grounds for denial of withholding enumerated in the Act, the applicant shall have the burden of proving by a preponderance of the evidence that such grounds do not apply.

(3) Exception to the prohibition on withholding of deportation in certain cases. Section 243(h)(3) of the Act, as added by section 413 of Pub.L. 104-132 (110 Stat. 1214), shall apply only to applications adjudicated in proceedings commenced before April 1, 1997, and in which final action had not been taken before April 24, 1996. The discretion permitted by that section to override section 243(h)(2) of the Act shall be exercised only in the case of an applicant convicted of an aggravated felony (or felonies) where he or she was sentenced to an aggregate term of imprisonment of less than 5 years and the immigration judge determines on an individual basis that the crime (or crimes) of which the applicant was convicted does not constitute a particularly serious crime. Nevertheless, it shall be presumed that an alien convicted of an aggravated felony has been convicted of a particularly serious crime. Except in the cases specified in

this paragraph, the grounds for denial of withholding of deportation in section 243(h)(2) of the Act as it appeared prior to April 1, 1997, shall be deemed to comply with the Protocol Relating to the Status of Refugees, Jan. 31, 1967, T.I.A.S. No. 6577.

(e) Reconsideration of discretionary denial of asylum. In the event that an applicant is denied asylum solely in the exercise of discretion, and the applicant is subsequently granted withholding of deportation or removal under this section, thereby effectively precluding admission of the applicant's spouse or minor children following to join him or her, the denial of asylum shall be reconsidered. Factors to be considered will include the reasons for the denial and reasonable alternatives available to the applicant such as reunification with his or her spouse or minor children in a third country.

* * *

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3. Section 208.18 of the Code of Federal Regulations provides as follows:

§ 208.18 Implementation of the Convention Against Torture.

(a) Definitions. The definitions in this subsection incorporate the definition of torture contained in Article 1 of the Convention Against Torture, subject to the reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention.

(1) Torture is defined as any act by which severe pain or suffering, whether physical or

mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

(2) Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture.

(3) Torture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. Lawful sanctions include judicially imposed sanctions and other enforcement actions authorized by law, including the death penalty, but do not include sanctions that defeat the object and purpose of the Convention Against Torture to prohibit torture.

(4) In order to constitute torture, mental pain or suffering must be prolonged mental harm caused by or resulting from:

> **(i)** The intentional infliction or threatened infliction of severe physical pain or suffering;
>
> **(ii)** The administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(iii) The threat of imminent death; or

(iv) The threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the sense or personality.

(5) In order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering. An act that results in unanticipated or unintended severity of pain and suffering is not torture.

(6) In order to constitute torture an act must be directed against a person in the offender's custody or physical control.

(7) Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.

(8) Noncompliance with applicable legal procedural standards does not per se constitute torture.

* * *

(e) Judicial review of claims for protection from removal under Article 3 of the Convention Against Torture.

(1) Pursuant to the provisions of section 2242(d) of the Foreign Affairs Reform and Restructuring Act of 1998, there shall be no judicial appeal or review of any action, decision, or claim raised under the Convention or that section, except as part of the review of a final order of

removal pursuant to section 242 of the Act; provided however, that any appeal or petition regarding an action, decision, or claim under the Convention or under section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 shall not be deemed to include or authorize the consideration of any administrative order or decision, or portion thereof, the appeal or review of which is restricted or prohibited by the Act.

(2) Except as otherwise expressly provided, nothing in this paragraph shall be construed to create a private right of action or to authorize the consideration or issuance of administrative or judicial relief.

[64 FR 8490, Feb. 19, 1999; 64 FR 13881, March 23, 1999]

* * *

APPENDIX B

[LOGO] **U.S. Department of Justice**
Immigration and Naturalization Service

A77 234 212

2035 North Central Avenue
Phoenix, Arizona 85004

Oct. 24, 2001

Monica Schurtman, Esquire
University of Idaho College of Law
Legal Aid Clinic
6th and Rayburn
Moscow, Idaho, 83844-2322

Dear Ms. Schurtman:

This is in response to your letter dated October 11, 2000, requesting the District Director to review Yi Quan Chen's case for consideration of release based on the decision rendered by the United States Court of Appeals for the Ninth Circuit.

Mr. Chen is a citizen and national of China who initially applied for admission into the United States on April 2, 1995, at the Miami International Airport with an altered Korean passport. Mr. Chen was subsequently ordered excluded from the United States and was removed from the United States to China on May 13, 1996.

Mr. Chen then attempted to re-enter into the United States on September 18, 1998, when the vessel he was a passenger in was interdicted in international waters by the United States Coast Guard. Because Mr. Chen was interdicted in international waters and brought into the United States, he is an arriving alien.

On June 7, 1999, an Immigration Judge ordered Mr. Chen deported, denied his application for asylum, his application for withholding of removal and relief under the torture convention. Mr. Chen then reserved his right to appeal the Immigration Judge's decision.

On September 24, 1999, Mr. Chen's request for a change of custody status was denied when the Immigration Judge found that Mr. Chen was an arriving alien and was therefore not eligible for a bond. Mr. Chen then appealed this decision to the Board of Immigration Appeals (BIA). On February 2, 2000, the BIA affirmed the Immigration Judge's decision that Mr. Chen is an arriving alien and is not eligible for a bond.

On April 10, 2000, the BIA dismissed Mr. Chen's appeal challenging the Immigration Judge's June 7, 1999, decision.

On April 16, 2000, Mr. Chen filed for and was granted a Stay of Deportation with the Ninth Circuit Court of Appeals.

On September 11, 2001, the United States Court of Appeals for the Ninth Circuit found Mr. Chen eligible for a discretionary grant of asylum and a mandatory grant of withholding of removal.

Based on these facts I am granting your request to release Mr. Chen under an order of supervision.

Sincerely,

/s/ Thomas M. Baranick
Thomas M. Baranick
Assistant District Director
Detention and Removal Operations

Supreme Court, U.S.
FILED
SEP 10 2002

No. 02-25

In the Supreme Court of the United States

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

YI QUAN CHEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

THEODORE B. OLSON
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The Ninth Circuit's decision in this case exemplifies its repeated application of erroneous rules of law that bar the Board of Immigration Appeals (BIA) from considering probative evidence and usurp the BIA's assigned fact-finding function. See Pet. 13-27; see also Pet. at 9-14, *INS* v. *Ventura*, No. 02-29 (filed July 5, 2002). The Ninth Circuit's approach to reviewing BIA asylum decisions puts it in conflict with decisions of this Court and of other courts of appeals. See Pet. 13-14, 20-22, 27. For these reasons, and in light of the large number of asylum cases that arise in that circuit (see *id.* at 29), certiorari is warranted.

1. The court of appeals' initial error in this case was its reversal of the BIA's determination that respondent did not support his asylum application with credible testimony. Respondent asserts (Br. in Opp. 4-6) that this Court's review is not warranted because the court of appeals "correctly stated" (*id.* at 4) that the BIA's findings of fact must be upheld unless "any reasonable adjudicator would be compelled to conclude to the contrary" (8 U.S.C. 1252(b)(4)(B); see Pet. App. 4a). The question presented by the petition, however, involves—not the court of appeals' recitation of the general

statutory standard—but that court's application of its own rules that defeat the standard Congress has prescribed. See Pet. 14-19. Respondent's defense of those rules is unavailing.

a. The court of appeals held as a matter of law (Pet. App. 7a-8a) that respondent's submission of counterfeit and inaccurate birth certificates during his 1995 asylum proceeding was immaterial to determining his credibility. The court gave two reasons for its conclusion: (1) that there could be "any number of reasons" for respondent's submission of fraudulent documents (Pet. App. 7a (quoting *Shah* v. *INS*, 220 F.3d 1062, 1068 (9th Cir. 2000)), and (2) that the fraudulent documents did not "enhance [respondent's] claims for asylum" (*id.* at 8a).

Echoing the court's first rationale, respondent argues (Br. in Opp. 11) that his use of the counterfeit documents in 1995 could not be deemed probative of his credibility because he offered a "plausible explanation" for them. But as respondent concedes (*ibid.*), his only "explanation" was that he did not personally obtain the documents and did not know why they stated an incorrect date of birth. See A.R. 143-145. Thus, the rule applied by the Ninth Circuit and defended by respondent is that the BIA may not consider an alien's use of fraudulent and inaccurate evidence when making a credibility determination if the alien denies responsibility for the fraud and inaccuracy. Such a legal rule squarely conflicts with the correct principles of review, which are that the alien has the burden of proving his case through credible testimony or other evidence (see 8 C.F.R. 208.13(a), 208.16(b)), and the BIA's credibility determinations must be upheld if —as in this case—a reasonable fact-finder would not be compelled to disagree (*INS* v. *Elias-Zacarias*, 502 U.S. 478, 484 (1992)).

Respondent suggests (Br. in Opp. 11) that the court of appeals' second rule—that an asylum applicant's use of coun-

terfeit documents must be ignored if the documents do not bear directly on persecution (see Pet. App. 8a) is part and parcel of the principle that "incidental" inconsistencies in an applicant's testimony will not doom his application. See *In re O-D-*, 21 I. & N. Dec. 1079, 1082 (BIA 1998). Respondent confuses the question of whether a defect in the alien's evidence can *contribute* to an adverse credibility determination, with the question of whether it will *alone* support such a determination. Cf. INS Immigration Officer Academy, *Asylum Officer Basic Training: Credibility* 27-28 (Mar. 1999) (noting that an isolated and immaterial false statement "may raise suspicions about the applicant's honesty, but would not in itself be a sufficient basis to find the applicant ineligible," whereas "[i]n most cases, a material falsehood defeats the applicant's claim"). In addition, respondent conflates two separate problems with the birth certificates he submitted—the fact that they were counterfeit, and the fact that they gave the wrong date of birth. The BIA relied, when making its adverse credibility determination, upon the counterfeit nature of respondent's evidence, not just the independently significant fact that the documents stated an incorrect birth date.[1] Pet. App. 20a; see *id.* at 56a. The BIA correctly determined (*id.* at 20a) that this is not a case in which the alien's use of a counterfeit document was explained in a manner consistent with the underlying claim of persecution, such as when the alien demonstrates "the creation and use of a false document to escape persecution by facilitating travel." *In re O-D-*, 21 I. & N. Dec. at 1083. Therefore, respondent's use of fraudulent evidence triggered the BIA's rule that an asylum applicant's "submission into evidence of

[1] As respondent observes (Br. in Opp. 11), the false birth date that he claimed in 1995 would have enabled him to obtain (among other possible benefits under the immigration laws) placement in foster care or other juvenile care, rather than in an INS detention facility. See *Reno* v. *Flores*, 507 U.S. 292, 297-298 (1993).

at least one counterfeit document generally discredits his testimony regarding asylum eligibility" (*id.* at 1082).

b. The court of appeals also held as a matter of law (Pet. App. 8a-10a) that inconsistencies between respondent's 1995 and 1999 asylum applications were not probative of his credibility. Respondent asserts (Br. in Opp. 12-13) that a change in federal law explains his change of theories of persecution. Yet respondent did not merely change his legal argument in the 1999 proceeding. He disavowed his earlier version of the facts.

In his first asylum application, respondent stated that he assisted his father's work for a Chinese political group called the Lianjiang Democracy Club, and that his father was sent to a labor camp because of his pro-democracy activities. A.R. 175, 178-179. In his second application, by contrast, respondent stated that neither he nor any family member had "ever" been affiliated with a political group or other organization, and—when asked whether he or a family member had "ever been accused, charged, arrested, detained, interrogated, convicted and sentenced, or imprisoned"—respondent did not mention pro-democracy activities or his father's supposed detention. Pet. App. 55a; see A.R. 341, 345. Moreover, after he was detained while attempting to enter the United States illegally in 1998, respondent was asked directly whether he would be harmed if returned to China, to which he answered only that he would have to pay a fine of approximately $3000 for being smuggled out of China, and would be jailed if he did not pay. Respondent again made no mention of family planning policies or a fear of persecution on any protected ground. Pet. App. 55a; see A.R. 243-244.[2]

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[2] When respondent was asked at the 1999 hearing why he did not mention his alleged pro-democracy activities and associated persecution in his asylum application, respondent answered that there was "not particularly any reason." A.R. 142-143. Respondent does attempt to explain (Br. in Opp. 14) another set of inconsistent statements involving his marital status in 1995. See Pet. App. 20a-21a. Under different circumstances, the

c. Respondent does not dispute (Br. in Opp. 8-9) that the court of appeals rejected the BIA's cumulative consideration of the defects in respondent's evidence, and engaged in the same type of "divide-and-conquer analysis" that this Court disapproved in *United States* v. *Arvizu*, 122 S. Ct. 744, 751 (2002). See Pet. 18-19. Yet respondent suggests (Br. in Opp. 8) that disaggregated consideration of his fraudulent, false, and inconsistent evidence was required because of "the asylum context." Respondent, however, identifies no principle of asylum law (nor any principle of administrative law) that requires the BIA to disregard facts that contribute to (but might not require) an adverse credibility determination, or that forbids the BIA from determining that material defects in an alien's evidence *together* evince a lack of credibility. The BIA acted entirely reasonably when it determined that "the counterfeit documents of record, the respondent's inconsistent testimony, and the lack of explanation by the respondent" *together* formed a "sufficient basis to affirm the Immigration Judge's adverse credibility finding." Pet. App. 21a.

d. Respondent claims (Br. in Opp. 6) that the decisions of the First, Fifth, Seventh, and Eighth Circuits that are cited in the petition (at 20) do not conflict with the Ninth Circuit's cases. Yet respondent later concedes (Br. in Opp. 7) that there *is* a conflict between the Ninth Circuit's approach to reviewing the BIA's credibility determinations and the Fifth Circuit's approach.[3] Furthermore, although the other

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BIA might have excused that particular inconsistency. In light of the other, unexplained inconsistencies between the facts respondent alleged in 1995 and the facts he alleged in 1999, however, the BIA surely was not required to do so.

[3] The Fifth Circuit gives "great deference" to the credibility determinations of IJs and the BIA. *Efe* v. *Ashcroft*, 293 F.3d 899, 903, 905 (5th Cir. 2002). Contrary to respondent's assertion (Br. in Opp. 7), however, the Fifth Circuit does review the record to ensure that contested credibility determinations are supported. See *Efe*, 293 F.3d at 905 (noting specific grounds for finding a "lack of credibility"); *Chun* v. *INS*, 40 F.3d 76, 79

circuits generally hold that adverse credibility determinations "must be supported by specific, cogent reasons" and must "bear a legitimate nexus to the finding," the Seventh Circuit has explained that this rule is *not* inconsistent with highly deferential review of BIA decisions. *Mansour* v. *INS*, 230 F.3d 902, 906 (7th Cir. 2000) (internal quotation marks omitted). Rather, "[c]redibility determinations * * * should only be overturned under extraordinary circumstances, and a reviewing court should not supersede an administrative agency's findings simply because an alternative finding could also be supported by substantial evidence." *Ibid.* Certiorari is warranted on Question 1 of the petition to review the Ninth Circuit's departure from those principles.

2. For the reasons stated in the petition (at 20-27) in this case and in the petition (at 9-13) and reply brief in *Ventura*, certiorari also is warranted to address the Ninth Circuit's practice of refusing to remand unresolved issues to the BIA for administrative consideration in the first instance.

a. Respondent says that, after the court of appeals made its credibility holding, "no issues remained for which the agency needed to make an initial determination" (Br. in Opp. 18), and the court of appeals "neither made its own findings, nor assessed the evidence in the first instance" (*id.* at 22). That is flatly wrong. The court of appeals candidly acknowledged that it was deciding issues about respondent's eligibility for asylum that the BIA reasonably "did not consider." Pet. App. 11a.

Respondent ultimately takes the position that a remand was unnecessary because "*the IJ* already considered the merits of respondent's claims if his testimony were deemed credible." Br. in Opp. 17 (emphasis added); see *id.* at 21. But the IJ's holding in this case was that, even if respondent's testimony had been credible, he still would *not* have estab-

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(5th Cir. 1994) ("We conclude that the IJ's finding that Chun was not credible is a reasonable interpretation of the record.").

lished eligibility for asylum or withholding of removal. Pet. App. 56a-57a. The court of appeals therefore could not have (and did not) rely upon any merits finding of the IJ. Furthermore, because it is the BIA that renders the final decision of the Attorney General, a determination by an IJ is not a substitute for a determination by the BIA. The BIA reviews IJs' asylum decisions *de novo*, and courts must review the BIA's decision, not the IJ's superseded decision. See Pet. 4; see also *Chun* v. *INS*, 40 F.3d 76, 78 (5th Cir. 1994).

b. Respondent also says (Br. in Opp. 20-21) that if he testified truthfully, then "any reasonable adjudicator would be compelled to conclude" that his fear of persecution was objectively reasonable, as well as that the persecution he feared was on account of his opposition to Chinese family-planning policies. Respondent's argument is entirely unresponsive to the point (see Pet. 24-26) that courts of appeals lack both the statutory responsibility and the expertise to determine in the first instance whether further proceedings are required to decide an application for asylum and, if not, what the final disposition should be.[4]

Like the court of appeals, moreover, respondent does not confront the record evidence that makes respondent's entitlement to relief entirely unclear even assuming, *arguendo*, that he testified credibly. At his asylum hearing, for example, respondent testified that he feared returning to China because of the "accumulation" of his illegal marriage, his two illegal departures from China, and his escape from a government hospital in Shanghai after he was returned to China in 1996. A.R. 118; see Pet. App. 52a. Respondent said that he was unaware of any ongoing danger to his wife, who

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[4] Respondent's discussion of Legislative and Executive Branch fact-finding about Chinese population-control practices (Br. in Opp. 26-27) highlights that asylum applications may implicate sensitive political and foreign affairs issues and, therefore, the need for particular judicial restraint.

(at least by respondent's account) was equally resistant to family-planning authorities. A.R. 139; see Pet. App. 50a-51a. As the IJ observed (Pet. App. 56a-57a) and respondent implicitly concedes (Br. in Opp. 20), respondent never testified or otherwise showed that his detention in Shanghai in 1996 was on account of family-planning issues, rather than his illegal departure from China in 1995. And the record in this case contains a State Department report indicating that Chinese authorities do not enforce a family-planning policy against pregnant women on the basis that they are in an unauthorized marriage. Pet. App. 56a. In light of such evidence, the one thing that is clear is that, even if respondent's testimony were to be credited, there are substantial questions about his entitlement to relief that have yet to be addressed by the BIA.

c. Respondent suggests that if courts allowed the BIA to order further proceedings on remand, then there would be "a never-ending loop of judicial review from which an asylum applicant could never escape." Br. in Opp. 19. Respondent apparently assumes that all remand proceedings in asylum cases will result in: (1) a BIA decision denying asylum and withholding of removal, which (2) the asylum applicant would challenge on judicial review, and (3) the court would reverse. Respondent provides no basis for any of those assumptions. To the contrary, respondent asserts that few asylum decisions are appealed to the courts, and that even the Ninth Circuit affirms the BIA "75% of the time" when an appeal is taken. *Id.* at 28. Furthermore, respondent's intimation of administrative intransigence and intentional delay is contrary to "the time-honored presumption in favor of the validity of" agency determinations (*Coleman* v. *Paccar Inc.*, 424 U.S. 1301, 1306 (1976) (Rehnquist, Circuit Justice)).[5]

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[5] There is no merit to respondent's suggestion (Br. in Opp. 25-26) that judicial usurpation of the Attorney General's decision-making power is justified in order to release aliens from lawful detention. That is

d. Respondent's denial that the circuits are in disagreement (Br. in Opp. 22-23) also does not withstand scrutiny. Although respondent identifies four cases in which other circuits have not remanded to the BIA after overturning an asylum decision, he does not dispute that other circuits generally abide by the rule that a remand is required unless there are "extraordinary circumstances." *FCC* v. *National Citizens Comm. for Broad.*, 436 U.S. 775, 793 n.15 (1978) (quoting *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952)); see Pet. 27; *Ventura* Reply Br. 7. Indeed, three of respondent's four cases are decisions of the Third Circuit, which very recently demonstrated its adherence to the remand requirement after overturning an adverse credibility finding in an asylum case. See *Gao* v. *Ashcroft*, 299 F.3d 266, 279 (3d Cir. Aug. 30, 2002).

3. Finally, respondent suggests (Br. in Opp. 28-29) that the Ninth Circuit's asylum jurisprudence is not sufficiently important to warrant the Court's intervention because the Ninth Circuit ultimately reviews only a small percentage of all the asylum cases that first come before IJs. Respondent concedes (*id.* at 28) that the Ninth Circuit grants eligibility for asylum or withholding of removal to dozens of aliens per year, which itself suggests the importance of the issue. Furthermore, respondent's argument about percentages ignores that the Ninth Circuit accomplishes its reversals of the BIA through the development and application of incorrect legal rules that constrain the Attorney General's statutory discretion. See Pet. 14-19. In order to avoid appeal and reversal, the Attorney General's delegates must follow the court of appeals' rules in cases that arise within that circuit.

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particularly true in the case of an alien, like respondent, who is stopped while attempting to enter the United States illegally and without any claim of entitlement to enter the United States, and whose detention during asylum proceedings therefore serves the purpose of preventing the alien's entry into the United States while his removability is being determined. See generally *Zadvydas* v. *Davis*, 533 U.S. 678, 693 (2001).

See, *e.g.*, Pet. App. 29a, 30a, 37a, 38a, 41a-42a (BIA dissenting opinion, invoking Ninth Circuit rules). Thus, the number of BIA asylum decisions reversed by the Ninth Circuit does not identify the number of asylum cases that are decided incorrectly because of the Ninth Circuit's holdings.

Respondent's calculations are significant in another respect, however. According to respondent, in the last fiscal year alone, the Ninth Circuit failed to remand in 28 out of the 55 asylum cases in which it did not affirm the BIA. Br. in Opp. 28. Thus, according to respondent's figures, the Ninth Circuit reverses and grants eligibility for asylum in a large number of cases, and it does so *more often* than it reverses and remands for further proceedings on eligibility. By respondent's own account, the Ninth Circuit plainly is not abiding by this Court's instruction that "[i]f the record before the agency does not support the agency action * * * the proper course, *except in rare circumstances*, is to remand to the agency for additional investigation or explanation." *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985) (emphasis added). The Ninth Circuit's widespread disregard for that fundamental principle of administrative law should not be allowed to stand.

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The petition for a writ of certiorari should be granted and the case should be consolidated for oral argument with *INS* v. *Ventura*, petition for cert. pending, No. 02-29 (filed July 5, 2002). Cf. *Ventura* Pet. 13-14.

Respectfully submitted.

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Solicitor General

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